



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E&L 43 OF 2013**

Formerly HCCC No. 154 of 1996

**OMARI NYAMBATI .....PLAINTIFF**

**VS**

**SMALL ENTERPRISES FINANCE CO. LTD.....1ST DEFENDANT**

**FESTUS KUBAI.....2ND DEFENDANT**

**BEATRICE KANGAI.....3RD DEFENDANT**

**DAVID KORIR SIMON .....4TH DEFENDANT**

**JUDGEMENT**

*(Suit by plaintiff to set aside an auction sale; allegation that no statutory notice nor notification of sale was issued; argument that matter first needed to be taken to arbitration before the auction sale; allegation that sale was below market price hence fraudulent; evidence tabled of statutory notice being sent to plaintiff; notification of sale having been served and property advertised; no law that requires sale to be at market price; no proof of any impropriety on part of defendants; suit dismissed with costs)*

**A. INTRODUCTION AND PLEADINGS**

1. This is an old case commenced by way of plaint on 6 August 1996. In the plaint, the plaintiff has pleaded that he borrowed the sum of Kshs. 170,000/= in the year 1990, from Small Enterprises Finance Company Limited (SEFCO), which is a wholly owned subsidiary of Development Bank Ltd. It is pleaded that the loan was to be repaid at the rate of Kshs. 8,000/= per month. To secure these monies, he charged his then properties, Uasin Gishu/Kimumu/563 and 567. It is pleaded that the plaintiff duly repaid the loan until about the year 1992, when he started defaulting, as his business was not doing too well. It is pleaded that in May 1996, he had a verbal discussion with the defendant's manager and the loan was rescheduled. It is averred that the defendant, without "preamble" and/or the requisite statutory notices, instructed Regent Auctioneers to sell the plaintiff's properties and that Regent Auctioneers did sell the said properties on 30 July 1996 at the price of Kshs. 160,000/= which is said to be an undervalue. The plaintiff has thus asked that the sale be declared null and void specifically for the reason that the defendant failed to issue the mandatory statutory notices and that no notification of sale was served upon the plaintiff. He has also asked that proper accounts be taken. In the alternative, he has asked that the defendant do pay damages for selling the suit properties below the market rates and that the amount due to the defendant under the charge be determined.

2. The plaint was later amended in the year 2002 to plead that the sale was fraudulent and/or negligently

conducted. The plaintiff pleaded the following particulars of fraud against SEFCO :-

- (a) instructing their agents to sell the properties without exhausting the provisions of the Loan Agreement.*
- (b) Instructing their agents to sell the property at a price reached unilaterally and in disregard of the provisions of the Loan Agreement, the law and dictates of the market rates at the time.*
- (c) Misleading the plaintiff to believe that the terms of repayment had been rescheduled.*
- (d) Ratifying sale not carried out as per the instructions.*

The particulars of negligence pleaded are :-

- (a) Failing to revert to the provisions of the Loan Agreement before causing the advertisement for sale of the plaintiff's properties.*
- (b) Failing to carry out or cause to be carried out valuation of the properties before dictating the reserve price or selling the properties.*
- (c) Failing to communicate with or notifying the plaintiff of their intention.*

3. In the year 2007, there was a further amendment to the plaint, to include three other persons as defendants. These are Festus Kubai, Beatrice Kangai, and David Korir Simon, who were now brought into the suit as the 2nd, 3rd and 4th defendants. It is pleaded that the properties were transferred to the 2nd, 3rd and later 4th defendant. I have however not seen any impropriety pleaded against the 2nd, 3rd, and 4th defendants. There is an additional pleading that SEFCO sold the property without first referring the matter to arbitration as in the Loan Agreement. An additional prayer to declare the transfer of the properties to the 2nd, 3rd and later 4th defendants is also included.

4. SEFCO as 1st defendant, filed a Statement of Defence and pleaded inter alia that the plaintiff executed a charge on 28 April 1992 over the suit properties to secure the sum of Kshs. 290,000/=. It is pleaded that this loan was to assist the plaintiff establish a fishing plant in Mbita Beach, and for purchasing the necessary machinery and equipment, over which the plaintiff executed a chattels mortgage in favour of the defendant. It is pleaded that there was default, and the plaintiff in the year 1994, instructed M/s Kimende Agencies to repossess and sell the machinery and equipment that were the subject of the chattels mortgage. The auctioneers were unable to locate the plaintiff's business and SEFCO thus moved to sell the charged properties. It is pleaded that there were two unsuccessful attempts to sell, as there were no bidders, on 13 July 1995 and 17 January 1996. However, on 30 July 1996, Regent Auctioneers managed to sell the properties for Kshs. 175,000/= at a public auction. It is pleaded that the sale of the properties was lawful.

5. The 2nd and 3rd defendants filed a joint statement of defence. The gist of their defence is that on 30 July 1996, they were declared the highest bidders at a public auction of the suit properties, and that the price paid was reasonable. They have denied that the properties were sold at an undervalue. It is pleaded that the suit properties were later sold to the 4th defendant about 8 years later. They have averred that they are innocent purchasers for value without notice of any terms and conditions of the loan advanced to the plaintiff.

6. The 4th defendant on the other hand pleaded that he purchased the suit properties on 28 February 2003 from the 2nd and 3rd defendants at Kshs. 300,000/= and that he is an innocent and bona fide purchaser for value. He is the current registered proprietor of the properties. It is also pleaded that the plaintiff is guilty of laches.

## **B. EVIDENCE OF THE PARTIES.**

7. The hearing of the suit kicked off on 7 November 2013. The plaintiff testified that he was given a loan of Kshs. 170,000/= although he had requested for the sum of Kshs. 290,000/=. He charged his properties to secure this sum. He stated that they also had a Loan Agreement which he produced as an exhibit. He stated that according to the Loan Agreement, disputes were to be referred to arbitration. He stated that he made payments of Kshs. 8,000/= per month up to the year 1995 when the bank varied the interest rates upwards. His business in the year 1995 was not doing well, and he approached a Mr. Njoroge, the SEFCO manager, Kisumu to have the loan rescheduled. He stated that they verbally agreed that the loan be rescheduled. In 1996, he was informed that some people had come to his properties and have chased away the occupants, on the claim that they have purchased the property. It is later that he came to learn that the properties were sold at kshs. 175,000/= and that he still owed the bank Kshs. 565,000/=. He testified that he had not been given any notice and that valuation of the properties was not done before sale. He engaged some valuers who valued the properties at Kshs. 1.466 Million for parcel No. 563 (which had a house on it) and Kshs. 173,000/= for parcel No. 567 which was vacant. The valuation reports were however not produced as exhibits. He later came to learn that it is the 2nd and 3rd defendants who had bought the properties at the auction and that they later sold the same to the 4th defendant. It was his position that the bank was first to go through arbitration before selling the properties in accordance with the Loan Agreement which was never done.

8. In cross-examination, the plaintiff acknowledged that he operated the address P.O Box 672 Homa Bay, and he was shown letters and a certificate of postage addressed to this address. He however denied receipt of the same. He agreed with the valuation of the properties of 1991, which were Kshs. 272,000/= for plot No. 567 and Kshs. 43,000/= for plot No. 563. He also agreed that the Loan Agreement and the Charge show that he received Kshs. 290,000/=. He also agreed that he was aware that the properties could be sold in case of default. He was also shown newspaper advertisements, advertising the property for sale, but he stated that he did not see them, as he does not read newspapers. He stated that he did not attend the auction but insisted that it was conducted in a manner to favour the purchasers. He stated that the reserve price was to be Kshs. 290,000/= although he agreed that the Charge and Loan Agreement do not mention this figure. He also agreed that he had exhibited a Notification of Sale in his list of documents.

9. With the above evidence the plaintiff closed his case.

10. DW-1 was the 2nd defendant, Festus Kubai Mwiragwa. He testified that the 3rd defendant is his sister in law. He testified that on 17 June 1996, he saw an advertisement in the Daily Nation newspaper and Taifa Leo newspaper and also billboards advertising the suit properties for sale. The plots were to be sold on 17 July 1996. They desired the plots and he and the 3rd defendant bid Kshs. 175,000/= for the properties. He stated that that was the then prevailing price in Kimumu area where the properties are situated. The two plots were then transferred into their joint names on 18 September 1998. In the year 2003, they sold the properties to the 4th defendant at Kshs. 300,000/=.

11. DW-2 was David Korir Simon, the 4th defendant. He testified that he purchased the suit properties from the 2nd and 3rd defendants. He registered the land parcel No. 567 in his name and the other, parcel No. 563, was registered in the name of his wife. Before he purchased the properties he did a search which showed that the properties were owned by the 2nd and 3rd defendants.

12. DW-3 was George Wachira Wahinga. He is the Finance Manager of both Development Bank Ltd and SEFCO. He testified that SEFCO advanced a loan to the plaintiff and charged the suit properties together with a chattels mortgage over the machinery and equipment of the plaintiff's business. There was default and a statutory notice was issued on 21 February 1994. The same was dispatched by way of Registered Post and another copy by ordinary mail to the address given by the plaintiff. He produced the letters and the certificate of postage. A notice was also issued to the District Commissioner of intention to sell the properties. He testified that the properties were sold by public auction by Regent Auctioneers. Cross-examined by counsel for the plaintiff, DW-3 testified that they did value the properties before the sale although he did not produce the valuation reports. He stated that they had attempted to sell the properties before in vain. In his view, the amount realized in the auction sale was the highest attainable under the circumstances.

13. With the above evidence the defendants closed their respective cases.

### C. SUBMISSIONS OF COUNSEL

14. In her submissions, counsel for the plaintiff submitted that the following issues are to be determined.

(a) Was a statutory notice as well as a Notification for Sale duly served upon the plaintiff before the sale of his property ?

(b) Was the auction sale of the charge (sic) valid ?

(c) Was the suit land sold at a value way below the market rates then ?

(d) Did the sale amount to breach of agreement on the part of the 1st defendant ?

(e) Is the sale to the 2nd and 3rd defendants and subsequently the 4th defendant null and void ab initio ?

15. She proceeded to submit that the sale was at an undervalue and that the price of Kshs. 175,000/= was a throw away price given that the market value was Kshs. 1.63 Million. It was her view that this being the case, the 2nd and 3rd defendants and subsequently the 4th defendant did not acquire good title. She was of the opinion that the auction sale should be declared null and void. In the alternative she asked for damages. She relied on a statement in the case of **Palmy Company Ltd vs Commercial Bank Ltd (2014) eKLR**, where it was averred that "*a mortgagee exercising statutory power of sale is to obtain the best price obtainable at the time of the sale.*" She also relied on Section 77 (1) of the Registered Land Act (CAP 300) (now repealed) which provided that "*a charge exercising his power of sale shall act in good faith and have regard to the interests of the chargor.*" She also submitted that due process was not followed and that a proper statutory notice and Notification of Sale were not issued as required by Section 74 (1) of the Registered Land Act. She also submitted that there was no proof that the District Commissioner was served. She pointed at the plaintiff's evidence where the plaintiff had stated that he came to know of the sale through a neighbour. She submitted that the 1st defendant had breached the Loan Agreement by failing to refer the matter to arbitration. She relied on additional authorities to demonstrate that a Statutory Notice and a Notification of Sale is mandatory before the power of sale can arise.

16. Counsel for the 1st defendant submitted that the plaintiff never produced any valuation reports to demonstrate the value of the properties and had therefore failed to prove that the properties were sold at an undervalue. On this point, he relied on the case of **Musa & Sons Ltd & Another vs First National Finance Bank & Another (2002) 1 KLR 581**. He further submitted that an auction sale is a forced sale which cannot bring forth the true market value. On this point, counsel relied on a dictum by Ringera J in the case of **Standard Chartered Bank Kenya Ltd vs Arjan (2001) KLR 368**. He submitted that the plaintiff cannot argue that he did not receive a Statutory Notice while at the same time conceding that the address in the Certificate of Postage was his own address. He further submitted that there was no proof that the loan was ever rescheduled and that there was no basis to argue that the matter first ought to have been referred to arbitration.

17. On the part of the 2nd and 3rd defendants, it was similarly submitted that there is no evidence of the value of the land when it was sold and therefore no demonstration that the sale was at an undervalue. Counsel also submitted that there was no proof of fraud nor proof of negligence in the conduct of the sale. It was his view that there is nothing to warrant the sale being declared null and void and asked that the case be dismissed with costs. He relied on various authorities to buttress his position.

18. The gist of the submissions of Counsel for the 4th defendant was that the proprietorship of the 4th defendant is protected by law as he is a bona fide purchaser for value.

19. It is with the foregoing pleadings, evidence and submissions that I need to decide this matter.

## D. DECISION

20. The evidence of the parties is at variance on several points. First it is the plaintiff's contention that he only received the sum of Kshs. 170,000/= whereas the position of the 1st defendant is that the sum of Kshs. 290,000/= was loaned. On this point, I think the matter is easily settled by looking at the Loan Agreement and the Charge. Both instruments demonstrate that it is the sum of Kshs. 290,000/= which was loaned out. That said, I do not think that the amount is material in the circumstances of this case.

21. In my view, the following issues are open for determination.

(i). *Was there any obligation or agreement to have the default of the plaintiff first referred to arbitration before proceeding with the sale ?*

(ii). *Was there a Statutory Notice issued and Notification of Sale ?*

(iii). *Was the property sold at an undervalue and if so what is the effect of this ?*

(iv). *Was the sale conducted fraudulently and/or negligently ?*

(v). *Is the plaintiff entitled to have the auction sale declared null and void and to have back his title ?*

*Issue 1 : Was there any obligation or agreement to have the default of the plaintiff first referred to arbitration before proceeding with the sale ?*

22. On the first issue, the plaintiff argued that they had a Loan Agreement which obligated the 1st defendant to refer the matter to arbitration before embarking on the sale of the properties. I have looked at the Loan Agreement and specifically clause 8.01 which contains the arbitration clause. It is drawn as follows :-

*"Any dispute or difference arising between the parties hereto concerning this Agreement or the construction meaning operation or effect of all or any part thereof or the parties' respective rights duties obligations or liabilities under or by virtue of this Agreement or otherwise relating to the subject matter hereof shall be referred to a single arbitrator to be agreed upon by the parties hereto or failing such agreement to a single arbitrator to be appointed by the Chairman for the time being of the Law Society of Kenya. The award or finding of any such arbitrator shall be final and binding on the parties hereto."*

23. It is this clause, upon which the plaintiff hangs on, to argue that the 1st defendant first had to go to arbitration before pursuing the sale of the properties. My own interpretation of the clause is that it was a dispute or difference on the construction of the Loan Agreement that was to be referred to arbitration. It has not been demonstrated to me that there was any difference touching on the construction of the loan agreement which was supposed to be referred to arbitration before the 1st defendant could proceed to exercise its statutory power of sale. Indeed in my view, a default in paying the loaned out sum, did not constitute a dispute on the construction of the Loan Agreement and there was no necessity to have the issue of default referred to arbitration. The argument of the plaintiff, that the matter of his dispute first ought to have been referred to arbitration therefore fails.

*Issue 2 : Was a Statutory Notice and Notification of Sale issued ?*

24. It is a requirement of the law that a Statutory notice and a Notification of Sale need to be issued before a chargee can proceed to exercise its power of sale. On that, there is no dispute. The land herein is registered under the Registered Land Act and the sale was conducted on 30 July 1996 when the Registered Land Act was still in operation. The applicable law is therefore the Registered Land Act. Section 74 of the said Act provided as follows where relevant :-

*74. (1) 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.*

*(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -*

*(a) appoint a receiver of the income of the charged property; or*

*(b) sell the charged property:*

*Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.*

25. The requirement for a Notification of Sale is contained in the Auctioneers Rules, made under the Auctioneers Act. Rule 15 thereof provides as follows :-

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

*(a) record the court warrant or letter of instruction in the register;*

*(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;*

*(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) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;*

*(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.*

26. The plaintiff argued that he was never served with either Statutory Notice nor Notification of Sale. The 1st defendant countered the argument that no Statutory Notice was issued, by producing both the Notice and the Certificate of Postage as exhibits. I have seen the same. The letter containing the said Statutory Notice is dated 21 February 1994. It is addressed to Omari Nyambati, C/o Mborogo Fishing Industries, P.O Box 672 Homa Bay. The Certificate of postage confirms that the letter was duly dispatched by Registered Post. The plaintiff has not denied that the letter was dispatched to an address that he himself provided. Indeed, the address utilized to dispatch the notice is that contained in the charge instrument and Loan Agreement as the address of the plaintiff. I do not see how the plaintiff can fault the chargor for dispatching the notice through the address that gave. In fact, I find it difficult to believe him when he says that he did not receive the statutory notices. The letter of 21 February 1994 gave the plaintiff 3 months from the date of service to pay up the monies. This is in line with the requirements of Section 74 of the Registered Land Act. In my view, a statutory notice was duly sent to the plaintiff.

27. I will not dwell too long on the issue of the Notification of Sale, for the plaintiff acknowledged in cross-examination, that he held a Notification of Sale, which he had in fact annexed to his bundle of documents, but chose, conveniently in my opinion, not to produce the same as an exhibit. The plaintiff did not explain how he came to be in possession of the Notification of Sale if indeed the same was never served upon him. I find that there was a Notification of Sale issued and served upon the plaintiff.

28. There is also evidence that the property was advertised in the Daily Nation and Taifa Leo newspapers

and the plaintiff cannot try to vitiate the sale because he did not read the newspapers.

29. I am of the view that all legal steps were followed prior to the auction sale.

*Issue 3 : Were the properties sold at an undervalue and what would be the effect of this ?*

30. The plaintiff argued that the properties were sold at a gross undervalue. It was his view that the combined value of the properties at the time of sale was beyond Kshs. 1.4 million, yet the sale only realized Kshs. 175,000/=. However, the plaintiff did not produce any valuation report to prove this allegation. There is therefore no evidence that the value of Kshs. 175,000/= did not reflect a fair price for the properties. That said, it ought not to be argued, that a property has not been sold at market price. There is no obligation for the chargee to sell at the prevailing market price. In fact, it would be superfluous to imagine that all auction sales will be at market value, for in most instances, the person bidding at an auction is out for a bargain, since he always has the option of going to the open market for a more or less similar property, if the price is too high. All that the chargee needs to do is act in good faith and follow the dictates of the law. If he does so, he cannot be faulted because the property does not fetch the market value, or even a value close to the market value.

31. There is no law which states that a sale below the market price is an illegal sale. The current law, which is contained in the Land Act, at Section 97, tries to create a benchmark of 25% of the forced sale value, below which there would be a rebuttable presumption that the chargee breached his duty to obtain the best price. In my opinion, considering the circumstances of this case, the bank acted in good faith and followed the provisions of the law. They got the best price available, since twice before, the properties had been placed on auction without any bidders. I cannot fault the 1st defendant for accepting the bid of Kshs. 175,000/= for the properties. It will be observed that in 2003, about 7 years later, the properties were sold at the price of Kshs. 300,000/= in the open market to the 4th defendant. I find it unbelievable that the properties were of the value of Kshs. 1.4 million as claimed by the plaintiff in the year 1996.

*Issue 4 : Was the sale conducted fraudulently and/or negligently ?*

32. Although fraud was pleaded, in my view, there was no evidence of fraud tabled by the plaintiff. Neither is there any evidence that the auctioneer, an agent of the 1st defendant, acted negligently. The allegations of fraud and negligence are completely baseless and it is not necessary for me to say more.

*Issue 5 : Is the plaintiff entitled to have the auction sale declared null and void and to have back his title and in the alternative, is he entitled to damages ?*

33. Having found that the sale was above board and all legal requirements followed, and having not found any evidence of fraud or negligence, I am unable to declare the auction sale null and void. In the same vein, I cannot grant the plaintiff any damages for he has not proved any impropriety on the part of any of the defendants.

34. I think I have dealt with all pertinent issues. I find that the plaintiff has failed to prove his case against the defendants and this suit must be dismissed. It is hereby dismissed. The only issue left is costs. Ordinarily, costs follow the event and I see no reason to depart from this. The plaintiff will therefore shoulder the costs of this suit.

35. It is so ordered.

**DATED and DELIVERED at ELDORET this 30th day of JANUARY 2015.**

**JUSTICE MUNYAO SILA**

JUADGE, ENVIRONMENT AND LAND COURT AT ELDORET

***Delivered in the presence of:***

