



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
AT MILIMANI NAIROBI
CIVIL SUIT NO 1026 OF 2001

MICHAEL MUNGAI.....PLAINTIFF

VERSUS

HOUSING FINANCE CO. (K) LTD.....1ST DEFENDANT

KENYA BUILDING SOCIETY LTD.....2ND DEFENDANT

TAIFA AUCTIONEERS.....3RD DEFENDANT

CHRISTOPHER AVISA.....4TH DEFENDANT

KENYA COMMERCIAL BANK LTD.....5TH DEFENDANT

JUDGMENT

INTRODUCTION

1. This matter has had a chequered history and several judges who heard disqualified themselves from hearing the same. At one point, the Plaintiff was represented by the firm of M/S E. K. Mutua & Co Advocates but thereafter he decided to act in person. Notably, despite being advised by several judges to get legal representation, the Plaintiff declined to heed to the said advise and thus represented himself herein.
2. In his own admission, the Plaintiff stated that he had filed about thirty six (36) applications which had at one or the other been dismissed by both the High Court and Court of Appeal. Indeed, the 1st Defendant's Chamber Summons application dated and filed 23rd July 2012 had sought that the Plaintiff be ordered to pay a sum of Kshs 2,000,000/= pending the hearing of the nineteen (19) applications that had been slated for hearing on the same date and also pending the hearing and determination of the suit herein. Ogola J did in fact order that the Plaintiff would be required to deposit a sum of Kshs 100,000/= before he filed any other application.
3. A brief background of this case was that on 11th November 1997, one Nancy Wanjeri Mungai (hereinafter referred to as "the Plaintiff's wife"), was issued orders in **Divorce Cause No 122 of 1997** in which the Plaintiff herein, the Respondent in that Cause was ordered to vacate L.R No

- Nairobi/Block 111/530 (hereinafter referred to as “the subject property”) failing which the Officer Commanding Buru Buru Police Station was ordered to oversee his eviction from the said subject property. These orders were set aside by Mbogholi Msagha J on 13th July 1998 in **HCCA No 335 OF 1997**. He maintained the *status quo* until the final determination of the said Divorce Cause.
4. On 16th January 2002, Ringera J (as he then was) allowed the 4th Defendant’s application seeking mandatory injunction orders against the Plaintiff for vacant possession of the subject property but on humanitarian grounds, he granted a thirty (30) days stay of execution of his orders to allow the Plaintiff and family make alternative living arrangements.
 5. Subsequently, on 25th February 2003, Osiemo J (as he then was) struck out the Plaintiff’s suit against the 4th Defendant for being frivolous and/or vexatious. The Plaintiff was to bear the costs of the 4th Defendant’s Chamber Summons application dated 16th July 2002 and costs of the suit.
 6. On 28th November 2012, Ogola J who was at one time seized of this matter directed that the firms of M/S Mugambi Laichena & Co Advocates and M/S Rachier Amollo & Co Advocates appear before him on 22nd January 2013 as the Plaintiff had contended that they had disobeyed the orders for execution of the decree herein. He, however, disqualified himself from this matter on 22nd February 2013.
 7. On 14th and 22nd February 2014 respectively, the Plaintiff and 1st Defendant filed their Summary Reports. The 1st Defendant’s Summary was dated 20th February 2014 while that of the Plaintiff was undated and did not seem to address the issues as had been contemplated. Notably, the Plaintiff had also filed a Summary Report dated 25th March 2013 on even date.
 8. In view of the age of this matter and the fact that the same appeared to be unending as a result of the many applications the Plaintiff had filed and continued to file, this court declined to hear the said pending applications and directed that the matter be fixed for hearing to bring it to a logical conclusion. Both the Plaintiff and the 1st Defendant complied with the Pre-Trial directions as had been directed by the court whereupon the matter was fixed for hearing. The 2nd, 3rd and 5th Defendants did not participate in the proceedings herein.
 9. The court spent numerous hours poring over the hundreds of documents that had been filed by the Plaintiff at different times with a view to comprehending his case as the same was not properly presented. Notably, Mwilu J (as she then was) and Kimaru J, amongst other judges, did at the times they were handling the case herein, observe that they were unable to understand the Plaintiff’s case. The judgment herein was thus rendered on the basis of documents that were filed at various times since suit was filed as a matter of giving the Plaintiff a fair and reasonable opportunity to present his case as a layman.

THE PLAINTIFF’S CASE

10. The Plaintiff’s Complaint dated 5th July 2001 was amended on 31st July 2001 and further amended on 19th October 2001. He filed suit after the 1st Defendant unlawfully instructed the 3rd Defendant to sell the subject property. The said subject property was sold in a public auction that was held on 28th June 2001.
11. It was his case that on or about 1989, the 1st and 2nd Defendants offered to sell to him and his wife the said subject property for a purchase price of Kshs 280,000/=. They were to pay a deposit of Kshs 41,323/- which was to cover a ten (10%) per cent, land costs, legal and other costs. The balance of the purchase price was to be spread over eighteen (18) months.
12. However, on or about 1990, the 1st and 2nd Defendants unilaterally and unlawfully increased the purchase price to Kshs 307,000/= spread over the same period of eighteen (18) months at monthly instalments of Kshs 4,583/= with interest at eighteen (18%) per cent calculated on a reducing balance basis.
13. He also contended that the 1st and 2nd Defendants failed to provide infrastructure and utilities as they had undertaken to do and also increased the cost price and monthly instalments through random unilateral, fraudulent, illegal, punitive and arbitrary charges. It was also his averment that the 1st Defendant conspired with one “M/S Nguni” to close and replace his Account No 102570 with Account No N98117846 in her name. He was categorical that he had been paying more

- monies than was required and as at the time the 1st and 2nd Defendants were selling the subject property, the arrears were less than one third (1/3) of the value of the property.
14. He stated that the 1st and 2nd Defendants coerced and misrepresented him into signing for the increase price and charge in 1991. Particulars of fraud and misrepresentation in the Plaintiff were itemised as follows:-
- a. **The property was sold at an undervalued price as a result of conspiracy between the Defendants.**
 - b. **The 1st and 2nd Defendants closed the plaintiff's Account No. 102570 and opened Account No 98117846 in the sole name of one Nancy Wanjeri Njure, his former wife.**
 - c. **Despite having repaid the entire purchase price, the 1st and 2nd Defendants unilaterally increased the purchase price and made false entries in the account.**
 - d. **The 1st and 2nd Defendant misrepresented to him the purchase price.**
 - e. **The 1st and 2nd Defendants threatened the Plaintiff that they would (sic) sue unless he executed the charge document and another agreement increasing the purchase price of the property.**
 - f. **The 1st and 2nd Defendants acted contrary to the provisions of the Banking Act and Companies Act.**

15. In his Further Amended Plaintiff dated 19th October 2001, he had sought the following orders:-

- a. **A declaration that the sale of parcel L.R. No Nairobi/Block111/530 was illegal and further the honourable court declare that the defendants, their agents or anybody else were not entitled to enforce payment relating to this transaction through advertising and auctioning of the plaintiff's home but through a suit if they had any claim.**
- b. **A declaration that the defendant's actions before providing the statement and utilities as requested by the plaintiff were illegal, amounts (sic) to intimidation and a breach of the original agreement.**
- c. **The honourable court order by way of a declaration that the 1st and 2nd Defendants acted illegally and order discharge, release of the title deed and transfer of ownership of land reference L.R. No Nairobi/Block111/530 to the plaintiff.**
- d. **The honourable court order the defendants to pay punitive and compensatory and or general damages for their misdeeds.**
- e. **The honourable court order accounts to be done and the 1st and 2nd defendants to refund all the sums that the plaintiff has paid to them above the sale price of house No. 283 agreed in 1989.**
- f. **Costs of this suit and any other relief that the court may deem fit to grant to the plaintiff.**

16. On 23rd January 2014, the Plaintiff filed his Witness Statement as well as that of Jonathan Mutuku and James Banga. His written submissions were dated 17th June 2014 and filed on 18th June 2014.

THE 1ST DEFENDANT'S CASE

17. Its case was that the Plaintiff was granted a loan facility of Kshs 280,000/= to purchase the subject property. He defaulted as a result of which the said subject property was sold as aforesaid to the 4th Defendant who was subsequently struck out from the suit herein.
18. The 1st Defendant's written submissions were dated 7th July 2014 and filed on 8th July 2014. The court did not seem to see its Statement of Defence in the court file although the matter did at one time appear to have been fixed for formal proof. However, in his written submissions that were filed on 18th June 2014, the Plaintiff did allude to a Reply to Defence and Counter-claim "in 2001". Indeed, the court did see a copy of the said pleading dated 4th December 2001 that had been attached to the Plaintiff's written submissions filed on 18th June 2014.

LEGAL ANALYSIS

19. The Plaintiff referred to cases that he filed or were filed by his wife, to build his case. From the court record, the court noted that some of these cases were **Divorce Cause No 122 of 1997 Michael Mungai vs Nancy Wanjeri & Others, HCCC No 17 of 2001 (O.S) Nancy Wanjeri vs Michael Mungai, HCCA No 335 of 1997 Michael Mungai vs Nancy Wanjeri & 4 Others and HC Civil Appl No NAI. 288 of 2008 (UR 190/08) Michael Mungai vs Kenya Commercial Bank Ltd & 4 Others.**
20. From the documentation that was presented by the Plaintiff, the genesis of this case could be traced to the letter dated 12th May 1989 (hereinafter referred to as “the Provisional Allocation Number 1177”) by Kenya Building Society Limited, the 2nd Defendant herein, which allocated Miss Ngure “Block 111 Plot No 530 House No 283, namely L.R. No Nairobi/ Block 111/ 530”, the subject property herein. The allocation was made on the understanding that she would personally occupy the house.
21. In a letter dated 4th June 2004 by Housing Finance, the 1st Defendant herein, to the Plaintiff, it was stated that the Provisional House Allocation No 1177 for a provisional price of Kshs 280,000/= that had been issued to Nancy Ngure and the Plaintiff was not taken up but that Provisional House Allocation No 0793 dated 26th February 1990 was issued to Nancy Ngure for the same subject property for the sum of Kshs 307,000/=. The Plaintiff was also listed as a Mortgagor in respect of the said subject property. The Lease dated 24th June 1991 showed that both the Plaintiff and his wife had been registered as Joint Tenants of the said subject property.
22. The Plaintiff had argued that they were to pay a sum of Kshs 28,000/= as a deposit which he did, leaving a balance of Kshs 252,000/= and not Kshs 282,060/= as had been contended by the 1st and 2nd Defendants. He denied having been a party to the agreement in respect of the sum of Kshs 307,000/= as aforesaid and was categorical that he had paid all monies that were due to the 1st and 2nd Defendants.
23. It was his evidence that the “third allocation” letter was issued to his wife without his knowledge. There was no indication which this allocation was. He seemed to dispute that his wife had instructed the 1st Defendant to sell the house or that she had taken a loan whose outstanding sum he said was Kshs 189,834.91. He contended that he refused to pay the same as he did not know the origin of the said sum. He termed this as fraud as he was confirmed in **HCCC No 17 of 2001 (O.S) Nancy Wanjeri vs Michael Mungai, HCCA No 335 of 1997 Michael Mungai vs Nancy Wanjeri & 4 Others and HC Civil Appl No NAI. 288 of 2008 (UR 190/08) Michael Mungai vs Kenya Commercial Bank Ltd & 4 Others,** to have been the owner of the subject property.
24. He did not present any evidence to show how the arrears in the sum of Kshs 162,950.14 against a loan balance of Kshs 361,188.10 alluded to in the 1st Defendant’s letter to him dated 31st January 2001 which was annexed to his Summary of Suit filed on 26th March 2013 were paid. Indeed, if it had been paid, he ought to have provided proof of payment of the same which he did not. Notably, in a letter dated 13th January 2000, the Plaintiff’s wife had implored the 1st Defendant to expedite the sale of the subject property due to the escalating interest as monies had not been paid since 1998.
25. There was a letter dated 7th April 2003 from the 1st Defendant to the Plaintiff indicating that it would release the sale proceeds to him and his co-borrower if he withdrew the suit he had filed in court. This assertion by the 1st Defendant was puzzling to the court considering that in one of the Bank Statements, it was indicated that as at 2nd June 2002, the balance in Account No N98117845 showed the amount was nil. It also had an entry for refund of Kshs 342,081.50 on the same date making it difficult for this court to understand exactly what transpired.
26. Indeed, the 1st and 2nd Defendants did not adduce any evidence to explain what these monies were, bearing in mind that the subject property was sold in 2001 when at the time, there was said to have been arrears.
27. Be that as it may, the Plaintiff failed to show that he had overpaid the 1st and 2nd Defendants or that the said Defendants conspired with his wife to close his account and open a new one without his knowledge or how that such action impacted on the repayment of the loan. He did not also

- present any evidence to suggest that the 1st and 2nd Defendants coerced him to sign the new agreement for Kshs 307,000/= or that he requested for accounts to be taken and the 1st and 2nd Defendants refused to do so. In the several documents that he filed in court, the Plaintiff annexed copies of several bank statements. It was therefore not clear to the court which accounts he wanted done with a view to the Defendants refunding him all the monies he had paid over and above the purchase price of the subject property.
28. From the Certificate of Lease dated 11th October 2011, it was evident that the subject property was registered in the name of the 4th Defendant. In a Certificate of Official Search dated 16th August 2011, the subject property had been charged to the 1st Defendant for a sum of Kshs 2,612,500/=. The 4th Defendant was thereafter for all purposes and intent the registered owner of the subject property.
 29. The Plaintiff did not present any evidence to indicate that the 4th Defendant was privy to the alleged fraud which could have affected the 4th Defendant's title. He did not also demonstrate how the 1st and 2nd Defendants were liable for the particulars of fraud or misrepresentation as had stated in his Further Amended Pleint.
 30. It was not sufficient for the Plaintiff to have stated that the particulars of fraud, defamation, misrepresentation and what he referred to as "**other crimes**" in his written submissions filed on 18th June 2014 were supplied in the Original Pleint dated 5th July 2001 and the Further Amended Pleint dated 19th October 2001. The standard of proof for fraud is quite high. However, the Plaintiff did not remotely prove the same.
 31. Despite furnishing the court with a letter dated 27th February 2012 from the Auctioneers Licensing Board that showed that Mr Wanderi who was trading in the name and style of M/S Taifa Auctioneers, the auctioneers who sold the subject property in a public auction on 28th June 2001, had no license in 2001 but that on 18th January 2001 he was issued with a license that had an expiry date of 31st December 2000, he did not call the maker of the document to tender the same in evidence.
 32. As the maker of the said letter, K. L. Kandet, the Secretary to the said Board ought to have been called as a witness to produce the said letter. The Plaintiff did not proffer any plausible explanation to demonstrate why the said K.L. Kandet could not come to court to testify on his behalf as completed by the Evidence Act Cap 80 (Laws of Kenya). The court did not therefore attach any weight to the said letter firstly, because the Plaintiff did not establish any nexus of the said letter to his case and secondly, the same contained information whose effect and veracity could only have been tested at the time of trial.
 33. Notably, the Plaintiff did not also call his two (2) witnesses to testify in support of his case. Jonathan Mutuku's evidence was that he accommodated the Plaintiff when he was evicted from the subject property while James Banga's evidence was that he was instructed by the Plaintiff to collect rent on his behalf, from the tenants who were residing in the subject property. That notwithstanding, the probative value of the evidence was nil for the reason that it was not tendered under oath. There unsworn statements remained just that, statements with no evidentiary value. In any event, the evidence would have not added value to the Plaintiff's case bearing in mind, the reliefs he had sought.
 34. Having considered the pleadings by the parties, the oral and documentary evidence and oral and written submissions, it was clear that the Plaintiff was not able to prove any of the reliefs he had sought. In view of the fact that on 25th February 2003, Osiemo J (as he then was) found that the suit against the 4th Defendant to have been frivolous and/or vexatious and struck out the suit against him and Ringera J (as he then was) had ordered the Plaintiff's eviction from the subject property, which orders had not been appealed against and/or set aside and/or varied, the court found that the Plaintiff could not succeed in any of the claims he had sought. The assertions that the subject property was sold at an under value were also superfluous in the circumstances as they were being brought in way after the event.
 35. The horse bolted from the stable when Osiemo J (as he then was) struck out the 4th Defendant from the suit herein. This in effect rendered the Plaintiff's prayers in his Further Amended Pleint obsolete as the title of the subject property could not be transferred back to the Plaintiff through a

- declaration in the absence of any tangible evidence.
36. Evidently, the order that the Plaintiff was hinging his case on was that of Mbogholi Msagha J that maintained the *status quo* pending the hearing and determination of the Divorce Cause between the Plaintiff and his wife. The same was in respect of him not being evicted from the subject property pursuant to orders that his wife had obtained in the **Divorce Cause No 122 of 1997**. This did not, however, in any way restrain the 1st and 2nd Defendants from releasing their security. In any event, the 1st and 2nd Defendants could not be bound by orders in a suit they were not parties to.
37. In the absence of any evidence to the contrary, the court found that the 1st and 2nd Defendants were entitled to dispose of the subject property. A dispute as to the figures would not have been sufficient reason for the 1st and 2nd Defendants not to have exercised their statutory power of sale. As was held by the Court of Appeal in the case of **Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd**, a dispute in computation of interest was a mathematical error that did not warrant restraining a chargee from exercising its statutory power of sale.
38. Similarly, in the absence of any evidence to the contrary, the Plaintiff was not entitled to any refund as he did not prove that he had overpaid any of the amounts to the 1st and 2nd Defendants or as had been pointed hereinabove that he had requested for accounts to be done and the 1st and 2nd Defendants refused to accede to the same.
39. In addition, the Plaintiff did not present any evidence to show how his claim in the sum of Kshs 13,875,200,000/=, his costs which had escalated from Kshs 19,000,000,000/= to Kshs 37,000,000,000/=, details of loss of use, interest, loss of earnings, loss of enjoyment and the amount from 1990, matters that he raised during his cross-examination came about or were computed.
40. For the reason that he did not prove even an iota of his claim, the Plaintiff would also not have been entitled to punitive, compensatory or general damages as he did not prove his case at all. In the case of **Civil Appeal No 132 of 2001 Bank of Baroda (Kenya) Limited vs Timwood Products Limited** (unreported), the Court of Appeal stated as follows:-

“... He could not have been awarded punitive or exemplary damages because in Kenya such damages are awardable only under two (2) circumstances, namely:-

- i. **Where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and**
- ii. **Where the defendant’s action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff...”**

41. The court found that there was no nexus or connection between the reliefs that were sought in the Further Amended Plaint dated 19th October 2001. Instructively, Khaminwa J (as she then was) heard an application in which the Plaintiff had sought similar orders to those in the Further Amended Plaint and found no proof at that interlocutory stage. This court found that the Plaintiff did not also support his claim at the trial stage.
42. The evidence that was adduced by the Plaintiff which only lends the court to come to the conclusion that the suit herein would not succeed against the 1st, 2nd, 3rd and 5th Defendants. Notably, the Plaintiff did not even explain how the 5th Defendant was involved in and/or connected to the matter herein.
43. As could be seen hereinabove, the Plaintiff refused to heed to the advice given by previous judges who handled this case to get himself legal representation. He failed to seek legal representation. As presented, the Plaintiff’s case could not succeed because it was not cogent or comprehensible. This court went over backwards to analyse the documentation that he filed without leave of the court just to understand what his case was all about. His case was not coherent and was not well explained.
44. However, layman or no layman, the Plaintiff was bound by his pleadings. The court therefore associated itself with the holding in the cases of **Associated Electrical Industries Ltd vs William Otieno [2004] eKLR** and **Nzoia Sugar Company Limited vs Capital Insurance Brokers**

Limited [2014] eKLR which we relied upon by the 1st Defendant in this regard.
45. The importance of complying with rules of pleading and mode of proof was well captured. In this regard, the court associated itself with the observations that were made in the case of **Molo Mount Mineral Water Limited vs Industrial Development Bank Limited HCCC No 113 of 2004** where Wendoh J stated as follows:-

“I do agree with the Court of Appeal’s decision in Mbaka Nguru vs James Rakwar CA 133/98 when the court said:-

“It will suffice to say that the plaintiffs who do not plead their damages properly and who then not prove the same do so at their own risk. They will not get these damages, however, sympathetic the court may feel towards them. The rules of pleading and mode of proof must be adhered to.”

DISPOSITION

46. For the foregoing reasons, the upshot of this court’s decision is that the Plaintiff’s Further Amended Plaint dated 19th October 2001 is hereby dismissed with costs to the 1st Defendant only as the 2nd, 3rd and 5th Defendants did not participate in the proceedings herein.
47. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of January 2015

J. KAMAU

JUDGE