



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO 3155 OF 1994

PETER MBURU NJOROGHE.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff initially filed his Complaint dated 30th August 1994 on the same date. Several amendments to the Complaint were effected. In a Complaint that was amended on 11th April 2005 and filed on 18th April 2004, the Plaintiff discontinued his cause of action against Cyrus Komo Chege and Rahab Mumbi Kihiu as 2nd and 3rd Defendants respectively.
2. It was his case that the Defendant advanced an overdraft loan of Kshs 200,000/= to one Raphael Kinyanjui Gichinga (hereinafter referred to as "the Principal Debtor") which the Plaintiff guaranteed by charging his properties namely L.R. No Lari/Kirenga/1179 and L.R. No Lari/Kirenga/1180 (hereinafter referred to as "the subject properties") to secure the said loan.
3. When the said Principal Debtor defaulted in paying the said loan of Kshs 200,000/= and another loan of Kshs 100,000/= that he had secured with his own property known as L.R. No Kiambaa/Kanunga/T. 474, the Defendant amalgamated the two (2) loans.
4. The Plaintiff said that offered to pay a sum of Kshs 85,511.90 plus costs and interest in respect of the sum that he had guaranteed the said Principal Debtor in installments of Kshs 3,000/= but the Defendant declined to accept the same and instead advertised the said subject property for sale by public auction.
5. He testified that despite obtaining a court order on 28th March 1995, the Defendant nonetheless sold the said two (2) subject properties on 29th March 1995 to the said Cyrus Komo Chege in a public auction for a total sum of Kshs 200,000/=. He contended that the sale was fraudulent for the reason that the Defendant did not serve him with the Statutory Notices, the subject properties were sold when there was a court order stopping the sale of the same, the valuation was not done, the Defendant failed to account for the sale proceeds and that there was breach of conflict of interest principles as the Defendant's advocates not only acted for the auctioneers but also acted for the purchaser.
6. He therefore sought the following reliefs:-
 1. ...
 2. ...
 3. ...
 4. (i) That the illegal sale and transfer of the Plaintiff's properties by the Defendant and all other subsequent transferees, if any, be nullified and cancelled forthwith.
 5. (ii) That the Defendant do provide clear and proper particulars detailing the complete movement of the Principle Debtor's overdraft loan of Kshs 200,000/= since the same was advanced to the time the Plaintiff's properties were purportedly sold.
 6. (iii) That the Defendant and/or its agents so provided (sic) a clear statement of account including the sale

price and utilization of the proceeds of sale of the Plaintiff's properties.

7. (iv) That in the alternative and without prejudice to the prayers above, the Defendant be ordered to pay full compensation to the Plaintiff based on the current values of his parcels of land.

8. (v) That damages be awarded to the Plaintiff against the defendant for the losses suffered by him following the unlawful sale of his two properties.

9. (vi) That the Defendants do pay to the Plaintiff the costs of this suit with interest.

10. (vii) Any other or further relief that this Honourable Court may deem fit to grant.

7. His initial List of Documents was dated 19th January 2006 and filed on 20th January 2006. His Witness Statement was dated 16th January 2012 and filed on 23rd February 2012. He subsequently filed another List of Documents dated 10th October 2014. He filed his Written Submissions dated 10th November 2014 on 11th November 2014.

8. The Defendant's Defence was dated 25th June 1999 and filed on 6th July 1999 while its Written Submissions were dated 13th January 2015 and filed on 19th January 2014.

9. The Defendant stated that in **HCCC No 2134 of 1992**, the Plaintiff was ordered to pay it a sum of Kshs 221,794.50 together with interest thereon at the rate of 21.5% from 4th July 1992 until payment in full as well as costs in the sum of Kshs 26,255/=. It contended that the Plaintiff had obtained the orders that were issued on 28th March 1995 fraudulently because the present suit had been stayed in 3rd February 1995 and that even if the said order was issued, the same could never had operated as an inhibition because it was never registered against the title of the said subject properties. It therefore sought that the Plaintiff's suit against it be dismissed with costs to it.

LEGAL ANALYSIS

10. The Plaintiff initially filed its undated Statement of Agreed Issues on 8th May 2000. He filed a further set of undated Statement of Agreed Issues on 11th February 2006. The issue were listed as follows:-

1. **Had the Plaintiff's equity of redemption been extinguished before the purported sale of his two properties?**
2. **Was the purported sale unlawful in view of the court order granted on 28.3.2005 (sic)?**
3. **Was the purported sale in compliance with law in general and the Registered Land Act in particular (sic)?**
4. **Was the Defendant entitled to sell the Plaintiff's two (2) properties instead of giving him an opportunity to repay the balance of the guaranteed amount of Kshs 85,111 1990 (sic) as at 9.2.1990 according to the proposals made then?**
5. **Were the properties sold in a properly advertised and conducted public auction?**
6. **Were the two (2) properties undersold for Kshs 200,000/= only as opposed to the Professional valuation of not less than Kshs 1,500,000/=?**
7. **Was the Defendant lawfully entitled to combine all the debts of the borrower and demand repayment from the Plaintiff, the guarantor of a specific loan of Kshs 200,000/=?**
8. **Was the Plaintiff entitled to proper notices prior to the sale and a full account of the proceeds of the sale after the sale?**
9. **Was the Plaintiff entitled to the remedies sought taking into account the general conduct of the Defendant as a secured lender?**
10. **Had the Plaintiff suffered loss and damage?**
11. **Who should bear the costs herein?**

11. The Plaintiff testified that after he and the Principal Debtor filed **HCCC No 2052 of 1989**, the Defendant separated his account from that of the said Principal Debtor. He was required to pay a sum of Kshs 85,111.90. He stated that vide its letter dated 9th March 1990, the Defendant acceded to his proposal to liquidate the said sum in monthly instalments of Kshs 3,000/=. He added that while the said suit was subsisting, the Defendant filed **HCCC No 2134 of 1992** against him and the said Principal Debtor and obtained *ex parte* judgment against them.

12. It was his contention that the Defendant's purported sale of his properties was unlawful as he had not been notified of the sale of the subject properties and that in any event, the same was sold on 29th March 1995 when there was in existence an order that was issued on 28th March 1995 restraining the Defendant from selling the said subject properties.

13. This order was issued by Hayanga J (as he then was) pursuant to the filing of the Plaintiff's application that had been presented to court on 28th March 1995. The order read as follows:-

“THAT as the file for the ruling is misplaced, the status quo in the matter must be maintained until after the ruling or further orders of the court.”

14. The Defendant did not call any witnesses to rebut the Plaintiff's assertions that there was an order restraining it from disposing of the subject properties. It did, however, submit that the said order could not have been made as the suit herein had been stayed. It referred the court to the order of 3rd August 2001 by Ringera J (as he then was) when he stated as follows:

“I am satisfied that there was a stay order in respect of this case by the court on 11.10.94. Accordingly all proceedings in this matter thereafter were made without jurisdiction. In the premises, I set aside all orders made on 19.1.95, 28.3.95 and 16.4.99.”

15. To understand the purport of Ringera J's order, the court perused the court file and noted that on 11th October 1994, Bosire J (as he then was) had made the following order:-

“1. THAT this suit and is hereby stayed.”

16. However, on 19th January 1995, Hayanga J (as he then was) made the following order in respect of the Plaintiff's application that had presented in court on 21st December 1994 seeking orders to restrain the Defendant from disposing of the Plaintiff's subject properties:-

“1. THAT the application be and is hereby dismissed.

2. THAT the applicant do pay the costs of this application.”

17. On 16th April 1999, Mbaluto J (as then was) also ordered as follows:-

“1. THAT the plaintiff be and is hereby granted leave to join CYRUS KOMO CHEGE and RAHABU (sic) WAMBUI KIHU in this suit.

2. THAT the draft amended plaint will be deemed as duly filed and served upon payment of the requisite fees.

3. THAT the costs of the application will be in the cause.”

18. The Plaintiff contended that he was not aware of the ruling of 3rd August 2011 by Ringera J (as he then was) as his advocate was sick and did not attend court when the said Ruling was delivered. He submitted that in any event, the impact and/or consequence of the said order of Ringera J (as he then was) was intended to justify the illegalities that had been committed by the Defendant.

19. The Plaintiff was emphatic that the said order of 28th March 1995 was served upon the Defendant. A perusal of the reverse side of the said order revealed that the same was received by the Defendant at 9.30 am on 29th March 1995 which was the same date that the sale of the subject properties was to take place. However, there was nothing on record that showed what time the said auction was scheduled on the said date.

20. Following a Notice to Show Cause why suit should not be dismissed, Khamoni J (as he then was) dismissed **HCCC No 2052 of 1989 Peter Mburu Njoroge & Another vs Barclays Bank of Kenya Limited** on 12th February 1997. On 29th September 2004, Emukule J reviewed and set aside the order of Ringera J (as he then was) of 3rd August 2011 as the said suit upon which led to the present suit being stayed had been dismissed. It was on that basis that the hearing herein proceeded.

21. Notably, in the same manner that the orders by Bosire J (as he then was) had to be reviewed and set aside before the suit herein could proceed, it therefore follows that no order could have been made between 11th October 1994 and 29th September 2004 that would have had the effect of restraining the Defendant from disposing of the subject properties.

22. In this regard, the court found itself in agreement with the Ruling of Ringera J (as he then was) that jurisdiction is everything and without it, the court had to down its tools and take no further action- **See Owners of Motor Vessel “Lilian S” vs Caltex Oil Kenya Limited [1989] KLR 1** that was relied upon by the Defendant.

23. Similarly, as Lord Denning held in the case of **Mcfoy vs United Africa Company Limited [1961] 3All ER 1169 AT 1172**

that was also relied upon by the Defendant, anything that is said to be a nullity is void *ab initio* and is deemed not to have existed.

24. The court noted that any *status quo* order that had been issued and was purportedly being extended on 28th March 1995 (pg 5 in the Plaintiff's List of Documents) was invalid for the reason that the suit herein had been stayed on 11th October 1994. Such orders could only have been made in **HCCC No 2052 of 1989 Peter Mburu Njoroge & Another vs Barclays Bank of Kenya Limited** which was in existence until 12th November 2007 when it was dismissed by Khamoni J (as he then was).

25. Appreciably, it was not necessary for the Defendant to have furnished the court with the said Ruling of Ringera J (as he then was) as the Plaintiff had contended as the same as well as all other orders were on the court record. What was evident to this court was that as the order of 28th March 1995 was a nullity having been issued in a suit that had been stayed, there was no order in place that would have had the effect of restraining the Defendant from disposing of the subject properties.

26. This court was of equal and concurrent jurisdiction with that of Ringera J (as he then was). In the absence of any evidence that the Plaintiff had appealed his order and that it was set aside by the Court of Appeal, this court's hands were tied and could not make any contrary determination of the validity of the orders that were issued on 19th January 1995, 28th March 1995 and 16th April 1999.

27. As regards the issue of how much the Plaintiff was required to pay, the court noted the letter of 9th February 1990 (pg 6 of the Plaintiff's Bundle of Documents) from M/S Muthoga Gaturu & Co Advocates to M/S Edwin N. Mugu & Co Advocates showed that the Plaintiff was required to pay a sum of Kshs 85,511/=. This letter was written under the reference of **HCCC No 2052 of 1989 Peter Mburu Njoroge & Another vs Barclays Bank of Kenya Limited** that was dismissed by Khamoni J for want of prosecution.

28. The Plaintiff did not provide any evidence that he paid the sum of Kshs 85,111.90, a sum he seemed to admit was payable by him. The sale of the subject properties took place on 29th March 1995 which was more than five (5) years from the date of the letter from M/S Muthoga Gaturu & Co Advocates and it is not clear whether interest was to accrue until payment in full.

29. The court was very hesitant to make a determination on that issue as that was the subject of another suit that was not before this court. In fact, there did appear to have been a decree that was issued in **HCCC No 2134 of 1992** against the Plaintiff for a sum of Kshs 221,794/=-, a fact he admitted in his cross-examination.

30. Evidently, the said advocates' letter dated 21st September 1995 (pg 8 of the Plaintiff's Bundle of Documents) indicated that the subject properties were sold by way of public auction to recover a debt amounting to Kshs 500,000/= leading the court to make a presumption that the said sum of Kshs 85,111.90 may have accrued interest.

31. As the court could only make an presumption on this issue, in the absence of concrete evidence, all the court could authoritatively discern from of the Guarantee (pg 1 of the Plaintiff's Bundle of Documents) was that the total amount recoverable from the Plaintiff was for a sum that did not exceed a sum of Kshs 200,000/= **in addition to such further sum of interest, other bank charges, costs and expenses recoverable on a full indemnity basis** (emphasis court). The full text of this requirement was spelt out in Clauses (2) and (3) of the said Guarantee which the court did not find necessary to set out in full. The court was thus not persuaded by the Plaintiff's submissions to make a definite finding that he was only entitled to pay the Defendant a sum of Kshs 85,111.90.

32. Going further, in his Amended Plaintiff, the Plaintiff had complained of exorbitant rate of interest and more than was allowed in law. However, as was rightly submitted by the Defendant, save for his averment in Paragraph (8) of the Amended Plaintiff, the Plaintiff did not adduce evidence to support his claim. He did not also submit on this issue. In view of the fact that the Plaintiff had failed to discharge his burden of proof to the required standard, the court found and held that his contentions on this issue fell by the wayside.

33. The Plaintiff did not also furnish the court with any evidence to demonstrate that the Defendant combined the sum due from him and the amount of Kshs 341,409.10 that was shown in the letter of 9th February 1990 to have been the sum due from the Principal Debtor as he had alluded to.

34. Similarly, the Plaintiff failed to demonstrate what loss and damages he suffered following the sale of his subject properties particularly in view of the fact that the court had found hereinabove that there was no order that had restrained the Defendant from disposing of the subject properties by way of public auction on 29th March 1995.

35. As regards the issue of the disposal of the subject properties at an undervalue instead of the valued amount of Kshs 1,500,000/=-, the court agreed with the Defendant that the evidence of Joseph John Wahome (hereinafter referred to as "PW 2") was not based on any empirical or known formulae. He did not furnish the court with any documentation to support his assertions on how much the Plaintiff had lost as income after the subject properties were sold. It was irrespective that he had stated that he had a degree in Land Economics.

36. The Plaintiff's evidence and submission that the subject properties would have enabled him to earn a sum of Kshs 23,000,000/= from production of an average of 1750 kg per hectare per year of pyrethrum appeared to have been purely speculative. The court was not persuaded that the same would be allowable. In any event, there was no evidence that was adduced before the court to show that the Plaintiff was in the business of production of pyrethrum before the said subject properties were sold. This assertion thus appeared farfetched.

37. Having said the above, it was important to establish whether or not the Plaintiff was served with the statutory notices before the Defendant exercised its Statutory Power of Sale. This was critical because the same would definitely have had consequences on losses and damages the Plaintiff would have suffered following an unlawful disposal of his subject properties.

38. Whereas in Paragraph 20 (a) of his Amended Plaint the Plaintiff averred that he was not served with statutory notices, he did not adduce any evidence to this effect. However, in his evidence, he denied having been served with any Auctioneers' notification of sale.

39. On pg 2 of his Witness Statement, he stated as follows:-

“In 1995 (sic) Auctioneers of the defendant served me with a notification of sale dated 13.2.1995 giving the outstanding figure 546,432.70 (sic) and title No. Kiambaa/Kanunga/474 registered in the name of the principal debtor was to be sold by public auction on 29.3.1995.”

40. The court was, however, unable to verify the said averments as the Plaintiff did not even furnish the court with a copy of the said notification that he was contending was not intended for him. He did not also call the Principal Debtor to confirm his said assertions. In the absence of any concrete evidence herein, the court was unable to make a definite determination as to whether or not the sale was conducted strictly in compliance with the Registered Land Act Cap 300 (Laws of Kenya)(now repealed) or whether or not the subject properties were sold in a properly advertised and conducted auction.

41. Be that as it may, it is important to note that the moment the Plaintiff denied having been served with the mandatory statutory notices, the burden shifted to the Defendant to demonstrate that indeed the said notices were duly served upon the Plaintiff and that its Statutory Power of Sale had crystallised.

42. While the court had found that there was no order that barred the Defendant from exercising its statutory power of sale, it was incumbent upon it to have ensured that it fully complied with the provisions of the law as the Chargee herein. It elected not to call any witnesses who would have given the Defendant's version of what really transpired before it disposed of the subject properties to its detriment.

43. In the absence of any evidence to the contrary, the only conclusion the court could make was that the Plaintiff was not served with the mandatory statutory notices. If the Defendant had done so, nothing would have been easier than for it to have submitted the said documentation to rebut the Plaintiff's evidence that he was not served with the said notices. This would essentially mean that he Plaintiff would have been entitled to an award of damages as the subject properties may have sold without the Defendant having complied with the provisions of the Registered Land Act (now repealed).

44. As was rightly pointed out by the Defendant, the Plaintiff elected to remove the purchasers of his subject properties namely, Cyrus Komo Chege and Rahab Mumbi Kihui to his detriment. He could not have been entitled to Prayer No (4) in the Amended Plaint. This is because the court cannot make orders against third against whom it would not be able to ensure compliance.

45. Bearing in mind that PW 2's evidence on the valuation of the subject properties (pg 11 of the Plaintiff's Bundle of Documents) was not controverted and/or rebutted by the Defendant, the court was more inclined to find on a balance of probability that the value of the said subject properties was Kshs 1,500,000/= for each of the properties.

46. From the Plaintiff's evidence, the court could only discern from the letter of 21st September 1995 from M/S Muthoga Gaturu & Co Advocates that the subject properties were sold to recover sum of Kshs 500,000/=. On the other hand, it was the Plaintiff's evidence that the said properties were disposed of for a sum of Kshs 200,000/=.

47. Unfortunately, the Plaintiff did not provide documentary evidence to show that indeed the subject properties were sold for the said amount of Kshs 200,000/=. This made it difficult for the court to establish the exact amount it would have taken into account when assessing the amount of damages the Plaintiff would have been entitled to. Indeed, the court also faced a challenge of ascertaining the exact amount the Defendant was claiming from the Plaintiff as this would definitely have been deducted from the amount of the valuation of the said subject properties and would thus have a bearing on the damages the court would have awarded the Plaintiff.

48. In any event, the Plaintiff seemed to have concentrated more on his claim of what appeared to have been loss of anticipated or expected income which the court found not to have succeeded. He did not submit on the issue of damages that would have been awarded had the Defendant been found to have sold his properties unlawfully. As a neutral arbiter, the court cannot be seen to prosecute the claim on behalf of one party and being an adversarial system, a party is expected to prove its case to the required standard and/or provide evidence and/or submit on issues to enable the court come to a just and conclusive determination of issues.

49. The court felt that both parties withheld certain crucial and material evidence that would have enabled it to make a just and definite conclusion of how much damages the court would have awarded the Plaintiff. The court cannot pluck a figure from the air and deem it to be the damages that it could have awarded the Plaintiff herein. Indeed, such a figure would be merely speculative and without any legal basis or support from known legal principles of the law. Due to paucity of evidence, it was the view of the court that Prayers Nos (4)(i), (7)(iv) and (8)(v) of the Plaint failed in their entirety.

DISPOSITION

50. Accordingly, having considered the pleadings, documents and written submissions in support of the parties' respective cases, the court came to the following finding and holding that the Plaintiff did not prove its case to the required standard. In the circumstances foregoing,

a. Prayer Nos (4)(i), (7)(iv) and (8)(v) of the Amended Plaint dated 11th April 2005 and filed on 18th April 2005 is hereby dismissed with costs to the Defendant.

b. However, as the Plaintiff was entitled to full disclosure by the Defendant, the court hereby grants Prayer Nos (5)(ii) and (6)(iii) of the Amended Plaint.

c. The Plaintiff shall bear the Defendant's costs of this suit

51. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of March, 2015

J. KAMAU

JUDGE