



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO 50 OF 1998

WELSA BANGE OGANDAPLAINTIFF

VERSUS

1. INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION

2. COAST PROFESSIONAL FREIGHTERS LTD

3. NADHIA LIMITED

4. ATTORNEY GENERALDEFENDANTS

J U D G M E N T

1 The plaintiff WELSA BANGE OGANDA filed this case in the year 1998. It was finally concluded before me on 16th September 2014. Plaintiffs evidence was received by Justice Maraga (as he then was now court of appeal Judge) on 17th May 2007. Plaintiff did not conclude his evidence then. On 26th June 2008 plaintiff continued to adduce his evidence in chief before Justice Sergon and the case was heard on different dates before that judge up to 2nd April 2009. On 1st July 2010 the case was further heard by Justice M. Ibrahim (as he then was now a judge of the Supreme Court). The case remained part heard before the said judges until 17th October 2011 when I took over the hearing on being transferred to the High Court at Mombasa. On that day I received the evidence of the plaintiff's witness number two until finally concluded this case.

2 I have placed the above information about the hearing of this case on record to illustrate that the parties in this case have had to wait too long for the conclusion of their case. I will in that vain echo the words used by the learned counsel Mr Munyithya appearing for the 2nd defendant, in his written submissions, where stated:

“It has indeed been a long journey to reach where we are today.”

3 The court file in this matter is very voluminous and it has indeed involved many hours in fact days of scrutiny, particularly because the case was part heard before three other judges before I took it over and also because it is a case that relies on documents between the parties. I need also to add that I do not know whether it was deliberate or by error that the pages of my written proceedings, were mixed up so much that if I had not been the one who recorded that evidence I would not have been able to follow the evidence.

4 The case against the Attorney general the 4th defendant was withdrawn.

5 Having considered the evidence tendered by the parties and their witnesses and the documents exhibited in this case I am for the opinion that this case will be determined by three issues. Those issues are

(a) Did the 1st defendant breach its agreement with the plaintiff or is the first defendant entitled to its claim in the counter claim;

(b) Did the 1st, 2nd and 3rd defendant commit fraud in the sale and transfer of the plaintiff's property MOMBASA /BLOCK/ X/219; and

(c) What remedies should the plaintiff get if the answers to (a) and (b) are positive.

1ST ISSUE

6 Plaintiff obtained from the 1st defendant two loan facilities.

FIRST LOAN

7 The first loan is represented by two disjointed documents, or instruments.

8 The first in line is dated 28th May 1975. It is entitled loan agreement. It is between the plaintiff as the borrower and 1st defendant (ICDC) as the lender. The agreement was for the amount of loan of Ksh 300,000. This agreement was not stamped nor registered at the lands office.

9 The second document is the first legal charge over MOMBASA/BLOCK X/219 between the plaintiff and ICDC it was dated 19th May 1975. The charge was for Ksh 300,000. The interest applicable to that amount was Ksh 10 ½ % whereas the interest applicable for amount used by ICDC to perfect or cause repair to the suit property was stated to be 9 ½ %. The charge instrument was registered at the lands office.

10 From the evidence tendered by all the parties in this dispute it became clear that it was the provisions of the charge that governed the dealing between the plaintiff and ICDC rather than the unstamped and unregistered loan agreement.

11 I began to say that the documents of the first loan were disjointed because they both “stand alone’. In other word the charge instrument does not incorporate the terms of the loan agreement and similarly the loan agreement does not also do the same.

12 The charge instrument provides for a loan of Ksh 300,000 payable at once and not in installments. That however is not what happened in reality. That money was disbursed in various installments. ICDC stated that it released the amounts required once the plaintiff provided architecture certificates. The plaintiff's case is that ICDC breached its agreement in failing to release the amount at one go as per the charge instrument, which release affected the progress of the construction on the suit property and also resulted in the wrong calculation of the interest due to ICDC.

13 The plaintiff's witness number two was Mr Omenye, an accountant. He gave detailed evidence on the release of funds to the plaintiff. He also showed a table which from his examination of the documents of ICDC revealed that the amount released to the plaintiff was actually less than what was stated to have been released by ICDC. He gave the following table to demonstrate this, as follows:

DOC,N O	Disbursement date	Amount ICDC have disbursed	Amount actually disbursed to Mr. Oganda	Amount retained by ICDC
64	28/9/1977	64,000.00	45,966.25	18,033.75

59	5/1/1977	64,000.00	63,000.00	1,000.00
66	8.4.1981	73,500.00	68,745.00	4,755.00
68	22/7/1981	64,000.00	61,795.00	2,205.00
70	27/11/1981	73,500.00	68,000.00	5,000.00
72	10/3/1982	53,600.00	47,270.00	6330.00
74	9/7/1982	29,400.00	14,060.00	15,340.00
66	1981	773,500.00	68,745.00	4,755.00
72	1982	53,600.00	47,270.00	6,330.00

14 In his report he also stated that although the charge instrument provided for interest at 10 ½ ICDC invariably changed the rate of interest applied to the plaintiffs account. That the rate of interest rose from 15% to 16% on 1st September 1988 and finally 18% by 1st June 1990 which was all along compound interest.

15 The plaintiff by his evidence and by his correspondence shows that he was adversely affected in the construction on the suit property, by the released of the first Loan by installments and also by the varying rates of interest. His letters dated 26th January 1981 clearly shows his frustration.

16 By letter dated 26th January 1981 to ICDC the plaintiff stated:

“ I refer to my visit in your office on 18th December 1980 and 31st December 1980 respectively where I was told to wait for valuers to come on the first week of January 1981. Since that time to date I have not seen the valuers.

Now I would like to request you to process and release the payment by the end of the month so that I don't have to over burden this project...”

17 In respect to the first loan Pw 2 after examining documents supplied by the plaintiff and ICDC stated in his report dated 26th April 2010.

“Finally, the loan was overpaid to the tune of Ksh 1,117,882.80 as at 31.8.1997, after paying a total sum of Ksh 1,643,991.28 made up as follows:-

Ksh

Interest on withheld funds (App.B)	998,92
Cash Repayment (Appendix A)	<u>645,747.36</u>
Total Repayment (App.C)	<u>1,643,991.28</u>

Less funds due to ICDC:-

Principal sum disbursed (Appendix A/C 281,966.00

Interest due thereon (Appendix A/C 244,142.48

Total amount due to ICDC 526,108.48

Amount overpaid (App.C) 1,117,882.08”

18 What that table shows is that the plaintiff had over paid his loan. The plaintiff’s witness was detailed and as can be seen from above provided figures to support conclusions reached.

19 Edward Gikonyo (Dw1) was the witness for ICDC. He confirmed that the first loan was released to the plaintiff by installments, and that the first installment was on 31st August 1975. This witness critized Pw 2 by pointing out that he erred to have calculated interest on amounts not disbursed. He stated that the loan was to assist the plaintiff to construct a building on the suit property. According to Dw1 construction was supposed to take place for a maximum of 12 months. Contrary to the evidence of plaintiff and Pw2 this witness said that there had been default in the repayment of the plaintiff’s first loan.

THE SECOND LOAN

20 The agreement of the second loan is dated 2nd April 1979. It was for an amount of Ksh 294,000 which was to be repaid and over a period of 10 years at the rate of interest of 12% or at such rate the board of directors of ICDC was from time to time to determine.

21 In the plaintiffs documents there is also a charge instrument dated 9th May 1979. This second charge was a supplementary to the first one. It provided for interest at 12% for the second loan. It did not provide for variation of that interest rate.

22 Dw1 stated in evidence that the second loan was also for construction. That the disbursement of funds in respect of this loan were subject to issuance of architects certificate.

23 Dw1 spoke of the different installment made to the plaintiff in respect to this second loan which in my view as contrary to the second charge. In respect of the first installment Dw1 said although the plaintiff should have received Ksh 73,500 he only actually received Ksh 68,735 because the difference being Ksh 4,755 was paid to the plaintiff’s lawyers Waruhiu

& Maite advocates.

24 That the plaintiff should have paid interest on the amounts disbursed but that he requested ICDC to offset the interest from the subsequent installments. That this retention explained why the plaintiff did not always get the full amount due to him when installments were paid to him.

25 Dw1 said that plaintiff was not servicing his loan consistently and that he was always in arrears.

26 Plaintiff by his evidence and the evidence of his witness Pw1 faulted the disbursement of the second loan by installments saying that the charge did not provide for such disbursement.

ANALYSIS AND DETERMINATION OF THE FIRST ISSUE.

27 I have considers the evidence tendered by the parties, the plaintiff’s submissions and exhibits before

court.

28 The plaintiff by his further amended plaint filed in court on 14th July 2005 pleaded that ICDC breached its duty of care and or breached the contract.

29 The particulars of that breach was that ICDC failed to pay to the plaintiff Ksh 300,000 as agreed in the first loan. That instead ICDC disbursed to the plaintiff Ksh 263,966.25 by piecemeal installments for a period of three years.

30 ICDC denied that allegations and pleaded that the loan was disbursed in accordance with the loan agreement dated 28th May 1975.

31 ICDC as the banker and the party who originated the contract and the charge instruments , executed by itself and the plaintiff, undoubtedly owned a duty of care to ensure the plaintiff was aware of which document regulated their relationship and which documents the plaintiff was expected to pay heed to.

32 The agreement 28th May 1975 provided for the disbursement of Ksh 300,000 by installment. However the charge instrument , which is not in any way related to the agreement of 28th may 1975, provided that the plaintiff would obtain a loan of Ksh 300,000 at once, and not by installment.

33 similarly the charge instrument provided for interest at 10 ½ % whilst the loan agreement provided that the rate of interest would change from time to time.

34 In my view if there is ambiguity it can only be construed against ICDC, as rightly submitted by plaintiff's learned counsel.

35 But since however ICDC intended to exercise its statutory power of sale over the suit property, which eventually it did, the instrument that governed the loan which led to that realization was the charge instrument and accordingly the loan repayments could only be governed by the terms of that charge. According to that charge the interest rate applicable to the loaned amount, for the first loan, was 10 ½ %. There was no provision for change of that rate of interest.

36 That means ICDC wrongly charged the plaintiff higher rate of interest not provided for in the charge instrument.

37 Even if it was to be accepted that the loan was subject to change of interest ICDC failed to provide evidence of notification to the plaintiff whenever those changes were effected to the rate of interest by the board of directors. Indeed I could see only one letter to that effect.

38 Further ICDC made deductions to the plaintiffs loan, which deductions were not authorized by the charge instrument and also which deductions were made without authority of the plaintiff. The example is payment was made to the firm of advocates Waruhiu & Muite on behalf of the plaintiff.

39 The second charge instrument dated 9th May 1979 brought the two loans together but treated each differently in as far as interest rate was concerned. In respect to the loan of Ksh 300,000 the first loan, it retained the interest rate of 10 ½ % per annum. In respect to the second loan of Ksh 294,000 the applicable interest rate was provided as 12%. In respect to each loan the charge instrument did not provide for variation of those interest rates.

40 Despite the differences in the interest of rate ICDC proceeded to amalgamate the two account, the one for the first loan and the second loan. Dw1 in evidence in this regard said

“Initially the loans were two different accounts but later were merged for ease of management. The arrears addressed in the letter of 1985 are of the two merged loans. Plaintiff did not liquidate the arrears despite the demand.”

41 ICDC's exhibit No.1, the bundle of documents dated 15th October 2010 page 119, the bank statements, clearly show the amalgamation of two accounts. The amalgamated account. No was 105200352.

42 The sum effect of that amalgamation was that the first and even the second loan which from the above discussion were chargeable interest rate at 10 ½ % and 12% respectively we on being amalgamated subject to varied interest rate. Such anomaly undoubtedly could have contributed to the plaintiff account showing arrears, which did not reflect the correct position.

43 With that background it would matter not if ICDC in evidence was able to show that the plaintiff was delinquent in the repayment of his loan or that he issued cheques which were dishonoured. ICDC would only be in a position to make positive statements about the plaintiff's record of repayment of the loan if the plaintiff's accounts reflected the correct interest rate. It is only then ICDC or even this court would be in a position to say what arrears of plaintiff's account were secured by the charge instruments.

44 I, in fact, applaud the plaintiff who went a step ahead and hired an accountant who was able to even unearth payments that were not fully paid to the plaintiff and further worked out the interest that ought not to have been charged when the first loan was not disbursed as it ought to have been. That is when Ksh 300,000 was not disbursed all at once.

45 ICDC breached its contract with the plaintiff as shown above. The more the pity is that the plaintiff in evidence and his many correspondence made it clear, and even ICDC was aware, that the funds were intended to construct a building that the plaintiff was expecting would yield an income for him and enable him to clear the loans. All his desires to have a commercial building were dashed by what I can only term as callous handling by ICDC. From the moment the first loan was negotiated and began to be disbursed by installments, contrary to the charge instrument the plaintiff had been set up to fail. It will be recalled above I reproduced the plaintiff's letter dated 26th January 1981 where the plaintiff was 'begging' ICDC to release fund to enable him complete the construction. The release of further funds by ICDC, by then, were delayed by failure of the ICDC valuer to evaluate the construction.

46 Although ICC claim from plaintiff Ksh 8,766.00.40 in their Counter Claim DW1 in giving evidence did not articulate this claim. He simply said that ICDC have a counter claim against the plaintiff. In my examination of 1st defendant bundle of documents I have not been able to see an amount of Ksh 8766,002.40 reflected. It therefore needed explanation. However in view of the discussion above the court finds that on a balance of probability the defendant did not prove the amount claimed in its counter claim. It therefore fails.

THIRD ISSUE

47 In approaching this issue some back ground would assist in its appreciation.

48 ICDC gave instructions to auctioneers, more than once, seeking that they would sell ICDC's security by auction. For one reason or another those instructions were withdrawn.

49 Nadhia Ltd, a firm of auctioneers on being instructed by ICDC to sell the charged property advertise the sale by a newspaper advert through the Daily Nation Newspaper of 9th September 1997. The property was slated for sale by auction on 17th September 1997.

50 ICDC allege that the auction took place on the day set and that the highest bidder was Patrick Mutune Kiasyo. The property was, however eventually registered in the name of the 2nd defendant, Coastal Professional Freighters Limited.

51 The plaintiff pleaded in his plaint that the sale of his property, the suit property, was fraudulent.

52 He particularized the fraud by stating that the property was sold in disregard of the auction Rules

and in what he terms 'black –market' because 2nd defendant did not pay 25% mandatory deposit required after the fall of the hammer, that in fact that property was sold by private treaty to the 2nd defendant without service of statutory notices . That ICDC assisted the 2nd defendant to obtain loan to finance that purchase using the plaintiff's title. That the final purchase price was paid by the 2nd defendant after inordinate delay of 130 days after an auction which the 2nd defendant did not participate and that he was not the highest bidder.

53 Plaintiff also pleaded that 2nd defendant wrongly and illegally obtained possession of the suit property wrongly dispossessing the plaintiff.

54 Plaintiff also pleaded that the 3rd defendant Nadhia Limited, the auctioneers, acted fraudulently in selling the property. He alleged that there was actually no auction conducted. That he failed to give sufficient notice of the auction to the public and the plaintiff. That he changed the date and time of the auction without notice.

55 The 3rd defendant did not offer any oral evidence in support of the defence filed on its behalf.

56 The plaintiff's allegations were denied by both the 1st and 2nd defendant.

57 The 1st defendant denied any wrong doing in application of interest to plaintiff loans and pleaded previous auctions were suspended because the plaintiff made offers to settle amount due; that the auction was held on 17th September 1997 which auction realized Ksh 4.5 million which amount was applied to reduce the plaintiff's alleged indebtedness.

58 Similarly 2nd defendant denied plaintiff's allegation. The 2nd defendant in its amended defence amended on 1st December 1997 pleaded that it had no knowledge of any fraud or breach of duty, toward the plaintiff. 2nd defendant then pleaded in its defence.

“ The second defendant states that having purchased the suit property in a public auction, the third defendant issued a certificate of sale to the second defendant and thereafter the second defendant charged the property to Savings and Loan Kenya Limited to secure the repayment of a loan of Ksh 3 million advanced to it.

The suit property has lawfully been transferred and registered in the name of the second defendant and a lawful charge over the said property has been registered in favour of Saving and Loan Kenya Limited and therefore the sale of the suit property cannot be set aside neither can the title issued to the second defendant be revoked.”

59 Evidence on behalf of the 2nd defendant was tendered by Patrick Mutune Kiasyo. He stated that he attend the auction on 17th October 1997. This is the date reflected in his written statement dated 16th September 2014 two. Kiasyo adopted that statement when he gave oral evidence in court. However on page 4 of Kiasyo's said written statement he stated that the auction date was 17th September 1997.

60 He proceeded to state that he was declared as the highest bidder at the auction when he offered Ksh 4.5 million. That he paid 25% deposit of that amount to the auctioneer and later he obtained a loan of Ksh 3 million to finance the balance of the purchase price. That it was thereafter he transferred the property to the 2nd defendant as its nominee. That he and his wife are directors of the 2nd defendant.

ANLYSIS AND DETERMINATION OF THE SECOND ISSUE.

61 The first thing to deal with is the issue whether the 1st defendant served a statutory notice as required under Section 74 of the Registered Land Act (now repealed) which was applicable at the time of sale of the charge property. Section 74 required, before a chargee exercised its power of sale, that a

three months notice be issued to the changor. The section forbade the exercise of power of sale before the expiry of three months.

62 The plaintiff denied both in evidence and by his plaint that he was served with that statutory notice.

63 1st defendant produced in evidence the statutory notice addressed to the plaintiff, through his postal address, dated 22nd December 1983. Even though the plaintiff denied receiving that notice, other than producing a copy of that notice the 1st defendant did not produce any evidence to corroborate its service.

64 In this regard although the plaintiff always maintained the legal burden to prove what he alleged but in the case of service of the statutory notice the 1st defendant bore the evidential burden of proof. It is only the 1st defendant who can prove to this court that the notice was served. 1st defendant did not prove that. 1st defendant being a corporation it is expected, even if the notice was not sent by registered post, which it ought to have been sent, there would be some information in the 1st defendant's registry to prove postage of that notice. The 1st defendant failed to shift the evidential burden of proof.

65 It is however what occurred or did not occur during the purported auction that will determine the second issue in this matter.

66 It will be recalled that the 2nd defendant Coastal Profession Freighter Limited pleaded in its defence that it was the entity that was declared as the highest bidder at the auction. That defence was not amended to show that the highest bidder was Kiasyo.

67 Kiasyo, on the other hand in his written statement said that the auction was held on 17th October 1997 and that I was him who was declared the highest bidder. He stated that he later transferred the property to the 2nd defendant where he is its director. There was no production of evidence before court that Kiasyo is indeed director of the 2nd defendant. There is indeed no evidence of the existence of the 2nd defendant as a corporate entity.

68 All this insistence of lack of evidence may seem trivial but cumulative, together with other short coming of that sale show that there was fraud perpetrated by the defendants. That may explain why the auctioneer Nadhia limited chose not to give evidence.

69 I will begin to unravel what seems to have happened on the day of the auction.

70 I begin by referring to a letter by Nadhia to the 1st defendant un-dated but received by 1st defendant on 14th October 1997. I reproduce it hereunder:

Industrial Commercial Development Corporation,

P.O. Box 45519

NAIROBI

T .N. Osolika

Deputy Corp Secretary

Dear Sir,

RE AUCTION OF MOMASA/BLOCK/X/291 ON 17TH September 97

In refer to the above mentioned, we act by your instruction to accept the bid from PATRICK MUTEN KIASYO of P.O. Box 41506 MOMBASA

In our telephone conversation OSOLIKA/MYSELF in the present of provincial office in Mombasa Mr. P M. KURUGUA we were instructed to accept the bid for Ksh 4,500,000 (FOUR MILLION FIVE HUNDRED THUOSAND) from PATRICK MUTENE KYASO for the property MOMBASA/BLOCK/X 291

The bidder (MR PATRICK MUTUNE KYASA) brought a bankers cheque of the 25% sale price.

Kindly note I received a copy of your letter dated on 1/10/97 to M/s MBAI and KIBUTHU ADOCATES returning the cheque relating to the auction of the above property. Should be brought to your attention my cheque No. 000001 was not attached.

We shal issue our cheque to ICDC once the bankers cheque clears. Attached is a copy of the bankers cheque from the bidder.

Yours faithfully

ABDILLAHI WASAME

MANAGING DIRECTOR

71 It will be noted that the auctioneer, by that letter, forwarded to the 1st defendant a copy of Kiasyo's cheque of 25% deposit. According to my calculation that should have been ksh 1,125,000. Looking however at plaintiff statement of accounts it was not until 30th November 1997 that an amount of Ksh 1.2 million was deposited in that account and not ksh 1,125,000.

72 But more importantly is that there was another buyer who had been declared as the highest bidder namely Mbai & Kibuthu advocates representing Daber enterprises whose cheque was returned and Kiasyo was declared the highest bidder.

73 A case was filed first in Milimani Commercial Courts Nairobi by Daber enterprises limited against the 1st defendant in Milimani HCCC N. 113 of 1999. Judgment was entered against 1st defendant for breach of contract for Ksh 11 million. 1st defendant appealed against that High Court award and in an application for stay of execution pending appeal the court of Appeal set out the facts of the case thus:

“RULING OF THE COURT

Deber Enterprises Limited. The respondent, was the successful bidder at a public auction sale conducted by the applicant's auctioneers (ICDC) on 17th September, 1997 at their premises along Meru Road, Mombasa.

The public auction was in respect of a piece of parcel of land known as Title No Mombasa/block.291 (the suit property) situate along Tom Mboya Avenue, Mombasa and was conducted in exercise of the applicant's statutory power of sale. The applicant is Industrial and Commercial Development Corporation.

It is common ground that the respondent, through its director one Bernard Mwangi Mbai was the highest bidder and that upon the fall of the hammer the respondent paid a sum of Ksh 800,000 being 25% of the bid price) to the auctioneer. The balance was payable within 30 days of the auction sale. It is also common ground that auctioneer upon receipt of sh800,000 aforesaid prepared and signed a certificate of sale dated 23rd September 1997 by which he confirmed having sold the suit premises to the respondent.

By their letter of 23rd September, 1997 the respondent's then advocates M.s Mbai & Kabuthu wrote to the managing Director of the applicant seeking documents to enable them to prepare the transfer of the suit property to the respondent. In this letter M/s Mbai and Kibuthu undertook to release the balance of the purchase price (less any rates and rents outstanding) to the applicant within seven days of registration of the transfer to the respondent adding that the respondent might require sixty days to enable it to organize finance necessary but that it expected to organize such finance earlier.

The applicant responded to the said letter of 23rd September 1997 pointing out that it was unable to release the documents as it was expecting to receive the balance of the purchase price within 30 days.

There was, it appears, a meeting between the Deputy Secretary to the applicant corporation and Mr Mbai. Mr Mbai is on record saying that it was agreed that his client would pay the balance of the purchase price within 30 days of the receipt of the documents subject to further mutually agreeable extension of such period for sufficient reasons.

All this seems not to have found favour with the applicant and it returned the sum of sh 800,000 to M/s Mbai and Kubuthu under cover of its letter of 14th October, 1997. The applicant sold the property thereafter to a third party.

The respondent commenced proceedings in the superior court for damages for breach of contract, specific performance of the contract by execution of all necessary documents, general damages, exemplary damages, interests and costs, and upon receipt of defence filed by the applicant, applied for summary judgment and striking out of the defence. The superior court (Commissioner Gacheche) struck out the plaint and entered summary judgment against the applicant in the sum of ksh 11,800,000.

At this stage we are only bound to inquire as to whether or not there is an arguable appeal and if so, would the success of the appeal be rendered nugatory if the order sought is not granted? The applicant seeks an order for stay of execution of the interlocutory judgment in the sum of shs 11,800,000 as well as setting down the suit for hearing by way of formal proof for assessment of general and exemplary damages pending the hearing and determination of the intended appeal.

74 If Daber Enterprise Limited were the highest bidders on 17th September 1997 and their offer was rejected by the 1st defendant when did another auction take place. And if Daber were the highest bidders, how could Kiasyo say he was declared the highest bidder on 17th September 1997. That declaration that he, Kiasyo was the highest bidder could only have been on another day and not 17th September 1997 going by the facts given at the court of appeal at the hearing of the stay pending appeal application which facts the court of appeal stated were common grounds between Darbe Enterprises and ICDC. Those very facts were repeated in the main appeal before three judges of the court of appeal in the case **INDUSTRIAL and COMMERCIAL CORPORATION –V- DABER ENTERPRISES LTD (2000) eKLR**. The three judges of appeal however went further to set out the conditions of sale that related to the auction of the suit property by Nadhia on 17th September 1997 thus:

Industrial and Commercial Development Corporation v Daber Enterprises Limited (2000) eKLR

The appellant as a chargee to the suit property had on 9th September, 1997 in exercise of its statutory power of sale advertised for sale by public auction the aforesaid property. That sale was to be conducted on 17th September, 1997 at 11.00am by the appellant's agents, M/S Nadhia Ltd, Auctioneers at their premises situate along Meru road, Mombasa. The conditions of sale were as follows:

“1 All intending purchasers are requested to verify the details for themselves as these are not warranted by the auctioneer nor the chargee.

2 The highest bidder shall be declared the purchaser and pay immediately a deposit of 25 per cent of the sale price in cash or by bankers cheque. The balance is to be paid within thirty (30) days from the date of the sale to the chargee.

3 Sale is subject to reserve price and other requisite consent.”

As advertised, the auction sale of the suit property was conducted by the appellant’s agents, M/S Nadhia Ltd, auctioneers at their above mentioned premises in Mombasa on 17th September, 1997. At that sale, the respondent was the highest bidder at Ksh 3,200,000 and at the fall of the hammer was declared the purchaser. In accordance with the conditions of the auction sale of the suit property, the respondent made a down payment of 25% of the purchase price, that is to say Ksh 800,000 and was subsequently issued with a certificate of sale. The balance of the purchase price amounting to Ksh 2,400,000 was to be paid by the respondent to the appellant within thirty (30) days from the date of the auction sale – 17th September 1997. Six (6) days later, the respondent wrote the letter referred to above to the appellant. In its letter dated 24th September 1997 the appellants response to the respondent’s letter aforementioned was, where relevant, as follows:

“The above mentioned property was sold by public auction. It is a condition that the purchaser should verify particulars pertaining to rates and ground rent as these are not warranted by the chargee.

In view of this we cannot release the documents as we are expecting to receive the balance of the purchase price within 30 days”.

Subsequent to this letter, the appellant and the respondent met and from their meeting, it would seem from the letter dated 26th September 1997 that the respondent accepted to pay to the appellant the balance of the purchase price of the suit property within thirty (30) days or receipt of the title documents, the discharge of charge and a duly executed transfer. According to this latter letter, the thirty (30) days period above mentioned could have been extended by mutual agreement and for sufficient reasons. The appellant’s reaction to the aforesaid letter was to refund to the respondent the Ksh 800,000 paid by the respondent at the auction sale of the suit property the same being the 25% of the purchase price of the said property. While acknowledging the refund of this sum of money, the respondent threatened to bring an action against the appellant for breach of contract which threat was carried out by the filing of Civil Case NO 294 in the superior court on 10th February 1998. On 12th March 1998 the appellant entered appearance and filed a defence to the respondent’s suit the gravamen of which was the respondent’s counter offer varying the conditions of the auction sale of the suit property which was unacceptable to the appellant.

75 With that information I again ask a rhetorical question when was Kiasyo declared the highest bidder. What is even more disturbing is that Nadhia issued two certificates of sale. One was to Daber Enterprise showing the amount of the bid was Ksh 3.2 million. That certificate needs to be reproduced for better understanding.

CERTIFICATE OF SALE

This is to certify that under instructions received from Messers INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION on behalf of their client THEMSELVES WE DID ON 17TH September 1997 subject to the conditions of sale provided by the Advocate, put up for sale by Public Auction the under mentioned property, result of which is as set out below:

1. PARTICULARS OF PROPERTY: ALL THAT PIECE OF PARCEL OF LAND known as MOMBASA /BLOCK X 291 containing by measurement approximate or thereabouts situate in MOMBASA District in the Republic of Kenya belonging to WELSA BANGE OGANDA.

2 The purchaser of the property at the sale was: DABER ENTERPIRSES LTD P.O Box 10681 NAIROBI

3 The highest bid received at the auction was Ksh 3,200,000.

For NADHIA LTD

Dated this 23rd day of September 1997

76 Nadhia also issued Kiasyo with certificate of sale dated 9th October 1997, although it will be noted that the month of September is cancelled and substituted with the month of October. I also believe it will assist if it is reproduced in this judgment, as follows:

CERTIFICATE OF SALE

This is to certify that under instructions received from Messers INDUSTRIAL & COMMERCIAL DEVEOLMET CORPORATION on behalf of their client THEMSELVES WE DID ON 17TH September 1997 subject to the conditions of sale provided by the Advocate, put up for sale by Public Auction the under mentioned property, result of which is as set out below:

1. PARTICULARS OF PROPERTY: ALL THAT PIECE OF PARCEL OF LAND known as MOMBASA /BLOCK X 291 containing by measurement approximate or thereabouts situate in MOMBASA TOWN District in the Republic of Kenya belonging to WELSA BANGE OGANDA.

2 The purchaser of the property at the sale was: MR PATRICK MUTUNE KIASYO P.O Box 41506 MOMBASA

3 The highest bid received at the auction was Ksh 4,500,000.

For NADHIA LTD

Dated this 9th day of (September cancelled) October 1997

77 Of greater concern to me is that the 1st defendant produced in evidence, in its bundle of documents dated 17th January 2007 page 55 a certificate of sale by Nadhia Limited which is blank except it is signed and stamped by Nadhia and it is dated 9th October 1997.

78 Again, the question is why would 1st defendant have in its possession a certificate of sale signed and stamped by Nadhia Ltd and dated but in the place where particulars of the property would be filled it is blank; and also the particulars of the purchaser are also not filled in, it is in that respect blank. Is it the case that the auctioneer issued to the 1st defendant blank certificate of sales for it to fill the details of however it wished to be reflected as the highest bidder.

79 The auction sale to Daber Enterprise, as per the facts narrated by the judges of the court of appeal was cancelled by 1st defendant because Daber enterprises requested for more time than was provided in the conditions of sale, to pay the purchases price. Kiasyo , if indeed he was the highest bidder on 17th September 1997 mind you the same day Daber Enterprises were declared highest bidder ought to have paid the balance of the purchase price by or about 17th October 1997. Plaintiff's bank statements with the 1st defendant however reveal that the balance of purchase price, Ksh 3 million was deposited in

plaintiff's account on 31st January 1998. What was so special about the purchase by Kiasyo that he was allowed more than 30 days to pay the balance of the purchase price while Daber Enterprises was disallowed. What other consideration went into the transaction of Kiasyo that he was more favoured. All those unanswered questions point to one thing, the sale of the charged property to Kiasyo was not overboard. No wonder the plaintiff referred to it as "Black market".

80 As the 1st defendant was issuing certificates of sale to both Daber Enterprises and Kiasyo the plaintiff through his then advocate Muhia & Associates secured a buyer for suit property for Ksh 22,000,000. Muhia & Associates Advocates communicated that information to 1st defendant and presumably forwarded the sale agreement dated 12th September 1997 evidencing the same. That offer to purchase the suit property at Ksh 22 million was rejected by 1st defendant which elicited the following reply from Muhia and Associates Advocates, in their letter dated 17th September 1997.

The Deputy corporation Secretary

Industrial & Commercial Development Corporation

Uchumi House

P.O. Box 45519

NAIROBI

Dear Sir,

RE: LAND TITLE NO. MOMBASA/BLOCK X /291 LOAN ACCONT NO. 105200362 INO. WELISA B OGANDSA

Thank you for your letter dated 16th September 1997, in reply to ours of 15th September 1997.

We are very disappointed that you have accorded no amount of seriousness to our proposal notwithstanding the fact that we have furnished you with all details as would have enabled you to give us a more favourable reply.

This is the only offer which has come from our office and we therefore take great exception to the offhand manner with which you have dismissed the same.

We are forced to agree with our clients sentiments that his property has been targeted by some interested parties.

However, be that as it may, we await the result of the intended auction, which is essentially flawed, so as to be able to advise the concerned parties accordingly.

81 The 1st defendant was aware that the above letter was exhibited in evidence by the plaintiff and yet failed to address the issue when it tendered evidence. That allegation made in that letter by learned counsels Muhia & Associates that the plaintiff's property was "targeted" was not rebutted. The least 1st defendant should have done was explain, in giving evidence, why it rejected an offer of sale of the property for Ksh 22 million and accepted Kiasyo's offer of Ksh 4.5 million.

82 The defendant cannot claim to be a purchaser without notice. This is in the light that the first party to be declared as the highest bidder on 17th September 1997 auction was Daber Enterprises. Even Nadhia's letter undated but received by 1st defendant 14th October 1997, reproduced above in this judgment acknowledges this, since it discusses refund of deposit of Daber Enterprises. The judges of court of appeal in their summary of the facts, again reproduced above in this judgment, stated that on Daber

enterprises being refunded their deposit of their auction bid, the property was to resold. It is clear that even as late as 26th September 1997 Daber enterprises and 1st defendant were having meetings to discuss whether Daber enterprises would be allowed to pay the balance of the auction sale within 30 days of the auction. If that is so, that those were the facts acknowledge by Daber Enterprises and seemed not to be denied by the 1st defendant how could Kiasyo be the one who was declared the highest bidder at the auction of 17th September 1997. The only answer to that nagging question is that Kiasyo was complicit to the illegal fraudulent arrangements being made behind the scenes and being made way after the 17th September 1997. The only party who could have assist the court to unravel how the property was declared as purchased by Kiasyo is Nadhia Limited, the 3rd defendant. The 3rd defendant failed to testify and however chose to rely on the evidence of the 1st defendant which did not at all address that issue.

83 If indeed Nadhia Limited sold the property to Kiasyo on a day that had not been advertised it was then in breach of Section 21 of the Auctioneers Act (No 5 of 1996). That section, which was in force at the date of auction required an auction to take place on the date and at the time and place advertised.

84 In the end I find that 1st defendant failed to meet the evidential burden of proof to show that the plaintiff was served with the statutory three months notice as required under section 74 of the RLA. Having so found I rely on the discussion and holding of Justice Chitembwe in the case **KAKAMEGA DISTRICT CO-OPERATIVE LTD -V-**

CO-OPERATIVE BANK OF (K) LTD & ANOHER (2013) eKLR thus :

“The purported sale was also un lawful as no statutory notice was given. Section 74 of the registered Land Act, (Now repealed) envisages a three months statutory notice..”

85 also in the case **NICHOLAS RUTHIRU GATOTO –V- NDARUGU MERCHANTS & 2 OTHERS (2014) eKLR** the court stated:

“It is trite law that non service of a statutory notice is a fundamental breach of the provisions of Section 74 of the RLA which derogates from the Chargor’s equity of redemption. In essence, without service of a valid statutory notice, the power of sale does not crystallize and any act done by the bank to dispose the suit property amounts to an illegality.

Having made the above observations, it is clear that the law supports the proposition that where a statutory notice was not served, the sale is null and void. Service of a statutory notice is a statutory requirement and a chargee’s power of sale is not exercisable without proof of such service. It therefore means that the sale by auction conducted on 30th June 1994 was void and this court has no power o give it any legal life.”

86 I have stated before in this judgment that the sale of the suit property to Kiasyo was shrouded in illegality. The evidence before court is in my view sufficient to meet the standard of proof in fraud. That standard was discussed in the case **URMILA W/O MAHENDRA SHAH -V- BARCLAYS BANK INTERNATIONAL & ANOTHER (1979) KLR 67,** where the *judges of court appeal stated:*

“To establish fraud a higher standard of proof is required, approaching proof beyond reasonable doubt.”

87 My discussion above has shown that, that standard of proof has been met. It is met because the auction of 17th September 1997 declared Daber Enterprises as the highest bidder and not Kiasyo. It follows that the certificate of sale issued to Kiasyo by Nadhia Limited was fraudulent and not reflective of the auction of that day.

88 Section 143 of RLA provides as follows:

143.(1) Subject to subsection (2), the court may order rectification of the register by directing

that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or mitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

89 The court is empowered by the above Section to rectify title where there is fraud. In case there is doubt whether this court can rely on the repealed statute that doubt is made clear by section 162 (1) of the land Act 2012 which states:

162. (1) Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

90 It was submitted by learned counsel for the 2nd defendant that this court cannot order rectification of the title because a copy of the title is not before court. To the contrary the 2nd defendant's own bundle of documents exhibited before court, more particularly page 20 has a copy of the title of the suit property. The plaintiff's exhibit No 24 is a transfer and attached to it is a copy of the title. I will therefore be able to satisfy Order 21 rule 6 of the Civil Procedure Rules which provides:

6. Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.

Since the plaintiff and 2nd defendant exhibited a copy of the same title in my view that rule is satisfied.

THIRD ISSUE REMEDIES

91 The plaintiff was denied possession, use and benefit of his property, which is a commercial enterprise, since September or thereabout of the year 1997. The 2nd defendant took over the suit property without an order of the court. The plaintiff will in that case be entitled for compensation for being dispossessed of his property now for 18 years. No doubt the 2nd defendant has for the last 18 years benefited from the profits made from that property. In my view the plaintiff is entitled to be compensated to the tune of Ksh 8 million by both the 1st and 2nd defendants. This will be in addition to an order rectifying the title.

CONCLUSION

92 In the end there shall be judgment for the plaintiff as follows:

(a) The alleged auction of 17th September 1997 of property MOMBASA/BLOCK X/219 is hereby declared null and void.

(b) The titled MOMBASA/BLOCK X /219 shall hereof be rectified to revert back to the plaintiff WELSA BANGE OGANDA in that regard COASTAL PROFESSIONAL FREIGHTERS LIMITED shall vacate MOMBASA BLOCK X/219 within 30 days from today's date failing which, eviction orders shall issue.

(c) There shall be judgment jointly and severally against INDUSTRIAL & COMMERCIAL DEVELOPMNET CORPORATION and COASTAL PROFESSIONAL FREIGHTERS

LIMITED for the plaintiff for Ksh 8 million.

(d) 1st to the 3rd defendants shall pay the plaintiff's costs of this suit.

DATED and DELIVERED at MOMBASA this 21st day of August 2015.

MARY KASANGO

JUDGE

21.8.2015

Coram

Before Justice Mary Kasango

C/Assistant -

For the Plaintiff:

For the 1st and 3rd defendants:

For 2nd defendant:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE