



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO. 1351 OF 1996**

**ALLIED INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**1. CITY COUNCIL OF NAIROBI**

**2. D.G. NJOROGE**

**3. JOHN MUSYOKA T/A MUSYOKA ADVOCATES**

**4. CAPITAL AUCTIONEERS**

**5. FASHION PLAZA LIMITED .....DEFENDANTS**

**JUDGMENT**

The Plaintiff through plaint dated 3<sup>rd</sup> June 1996 seeks jointly and severally against the Defendants; current market value of suit land L.R. 209/8583, General damages, exemplary damages, interest and costs of the suit. The suit land L.R. No. 209/8583 (suit land) was originally registered in the Plaintiff's name Allied Investments Limited under the **Registration of Titles Act (RTA)**.

By Nairobi Resident Magistrate *Civil Case No. 13 of 1994*, Nairobi City Council (1<sup>st</sup> Defendant) sued Plaintiff in the City Court to recover arrears of rates amounting to Kshs. 149,918/- accrued from 1976 up to 1989. The Plaintiff further claims that summons were issued to A. Investments Ltd to enter appearance in court sometime in 1996. He avers that he was never served with the summons though he had paid in full the rates being sought by the 1<sup>st</sup> Defendant which it had failed to credit. He allegedly failed to attend the hearing as the advertisement in the newspaper giving notice of the suit was served on A. Investments Limited and not the Plaintiff. As a consequence, an ex parte judgment was entered against A. Investments Limited.

When an application for execution of decree was made it was against the Plaintiff while the decree given at the City Court was given against A. Investments Ltd. The plaintiff avers that these and other discrepancies in how the proceedings in the lower court were handled led to the conclusion that the Defendants had conspired to defraud the Plaintiff of its property. Particulars of fraud are listed in

paragraph 13 and 14 of the plaint.

The Plaintiff asserted that the 1<sup>st</sup>- 4<sup>th</sup> Defendants conducted an illegal auction in order to sell the property to the 5<sup>th</sup> Defendant. He further averred that there was no evidence that the terms of sale were ever settled or that valuation was ever obtained as required by law.

By an order dated 5<sup>th</sup> August, 1994, the City Court transferred the suit land to the 5<sup>th</sup> Defendant in compliance with a vesting order issued by the Resident Magistrates Court. The 5<sup>th</sup> Defendant later transferred the suit land to Chic Fashions Ltd apparently to disguise the persons who had acquired the property consequent to the aforesaid illegal and fraudulent actions.

The 1<sup>st</sup>- 4<sup>th</sup> Defendants filed joint defence dated 16<sup>th</sup> July 1996. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied filing Nairobi RMCC No. 13 of 1991 as alleged and put the plaintiff to strict proof; they claimed that the Plaintiff had not paid rates in connection with the suit land; fraud and illegality was denied and the plaintiff put to strict proof; the Defendants denied the contents of paragraph 10 and stated that the Plaintiff was the Defendant in Civil Suit No. 13 of 1991 and further that he was duly served with summons; they denied the loss and damage alleged and put the Plaintiff to strict proof.

The 5<sup>th</sup> Defendant filed statement of defence on 23<sup>rd</sup> July 1996 where it denied everything in the plaint and added that it was a bona fide purchaser of the suit land the same having been duly and lawfully advertised for auction by the 4<sup>th</sup> Defendant on the instruction of the 1<sup>st</sup> Defendant. It also denied all the particulars of fraud and put the plaintiff to strict proof. It asserted that it received a good title which it transferred to Chic Fashions Limited; the 5<sup>th</sup> Defendant also denied that it was ever related to the said Chic Fashion; finally it was contended that the suit is res judicata having been determined by a competent court.

The suit was heard by Mugo J. I have prepared this judgment under Order 18 Rule 8 of the Civil Procedure Rules.

The Plaintiff called one witness while the 2<sup>nd</sup> Defendant testified. However the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants died during the pendency of the suit and an order for abatement of the suit against them was made.

The first witness for the Plaintiff, **Francis Thumbi Nyamu (PW1)** asserted that he jointly owned the Plaintiff together with other deceased directors. That the Plaintiff Company invested in the suit land sometime in early 1990. That though the title document bears a vesting order in favour of the 5<sup>th</sup> Defendant, he never dealt with the said party. He insisted that he was also unaware of RMCC No. 13 of 1991, in any case it was a matter between the 1<sup>st</sup> Defendant and A. Investments Limited an entity he is not familiar with.

Summons to appear in Court were sent to A. Investments Limited and a letter drafted by the 3<sup>rd</sup> Defendant to the Magistrates' Court Civil Division in Nairobi dated 9<sup>th</sup> March 1993 requesting for a decree in the matter all showed that the defendant was A. Investment Limited. That in the Court documents, the decree is shown to be for execution against the Plaintiff yet it was not served with application for execution of decree. The 'notice of the day fixed for settling a sale notification' which set the date fixed for settling terms of proclamation of sale as 4<sup>th</sup> November 1993 was never served on the Plaintiff, yet it should have been served upon it personally.

The notification of sale was surprisingly addressed to A. Investment Limited; it authorized the 4<sup>th</sup> Defendant to sell the property on 31<sup>st</sup> December 1993 (an earlier date indicated as 10<sup>th</sup> December 1993 is cancelled); it was authored by the 3<sup>rd</sup> Defendant. Another document in the Plaintiff's possession titled 'Order to Bailiff' in the suit RMCC No. 13 of 1991 addressed to the 5<sup>th</sup> Defendant gives the date for sale as 9<sup>th</sup> December 1993; though the copies of proclamation are directed to be published in a conspicuous place and advertised in the **Standard** and **Nation** Newspapers, PW1 insisted that he had never seen the

advertisements with reference to the Plaintiff. He also produced a document which he said was identical to the notification for sale whose date of sale is 10<sup>th</sup> December 1993. Both documents purport to be signed by the same Senior Resident Magistrate.

Another discrepancy which the witness pointed out is that of an affidavit sworn on 9<sup>th</sup> February 1994 by the 2<sup>nd</sup> Defendant in RMCC No. 19 of 1991 which shows the Plaintiff as the Defendant yet the original Defendant in the suit was A. Investment Limited. There is no evidence of the Plaintiff having been joined in the suit. In the affidavit, it is sworn that Judgment was entered against the Defendant on 16<sup>th</sup> January 1992 for Kshs. 229,540/35 being rates in respect of the suit land. That while the deponent in the affidavit swears that a public auction occurred on 31<sup>st</sup> December 1993 where the 5<sup>th</sup> Defendant bought the suit land for Kshs. 800,000/-, the notification of sale shows that the date of sale was 26<sup>th</sup> August 1994.

The vesting order is also shown to have been affixed on the title document on 21<sup>st</sup> March 1994 and yet the sale was intended for 26<sup>th</sup> August 1994. A letter by the 3<sup>rd</sup> Defendant to the Senior Resident Magistrate, City Hall requesting for extension of the sale to 26<sup>th</sup> August 1994 also raises questions on why there would be need for extension of sale the yet in other documents it is said to have taken place on 31<sup>st</sup> December 1993.

According to the witness, the gazette notice issued on 16<sup>th</sup> September 1994 addressed to the whole world to give them a chance to object to the issuance of a provisional certificate to the 5<sup>th</sup> Defendant did not take the mandatory 90 days in the gazette before a provisional certificate was issued to the 5<sup>th</sup> Defendant. Transfer to Chic Fashions was issued on 26<sup>th</sup> August 1994 the intended date of the auction according to some of the documents in the Plaintiff's possession. That he came to know the suit land had been sold when in the course of an attempted sale it was discovered that the suit land had been sold to another party. That is when he instructed his Advocates to file this suit after an attempt to set aside the lower court's orders in RMCC No. 19 of 1991 failed.

Upon cross-examination, he conceded that rates were to be paid to the 1<sup>st</sup> Defendant though he didn't remember ever getting demands for payment of rates. That though he changed the Plaintiff's postal address at some point, he doesn't recall communicating the same to the 1<sup>st</sup> Defendant. There is therefore a possibility that the letters sent to the Plaintiff using the earlier address were never received. This is despite the fact that the Plaintiff continued to pay rates to the 1<sup>st</sup> Defendant. He did not have receipts to confirm that rates were ever paid. He insisted that the suit filed for recovery of rates and the process of sale was against a different entity from the Plaintiff; that the suit land was to be sold by the Plaintiff at Kshs. 2.2 Million when it was discovered that it had already been sold wrongfully.

In re-examination, the witness maintained that by the time the sale agreement to dispose off the suit land was executed on 14<sup>th</sup> March 1994, the postal address had already changed.

The 2<sup>nd</sup> Defendant testified on his own behalf and on behalf of the 3<sup>rd</sup> Defendant. He stated that he was the only surviving partner in the 3<sup>rd</sup> Defendant law firm as the other partner is deceased. That he took instructions to act for the 1<sup>st</sup> Defendant in 1992. Though the 3<sup>rd</sup> Defendant represented the 1<sup>st</sup> Defendant during the sale of the suit land, it was not involved in drafting the pleadings. When a search was conducted on the suit property, a letter was sent to the Plaintiff by registered post advising it that there was a notification of settlement of sale and a prohibitory order as regards rates payable to the 1<sup>st</sup> Defendant. He concluded that as the letter was not sent back, he presumed it was received as neither an acknowledgment nor a complaint was ever received from the Plaintiff. As this and other letters were never responded to, the 3<sup>rd</sup> Defendant moved to the city court requesting them to issue a decree against the Plaintiff. However, the decree issued was against A. Investment Limited.

He instructed the 4<sup>th</sup> Defendant to advertise the property for sale to recover the rates arrears and they conducted an auction on 31<sup>st</sup> December 1993. They were promptly informed that the sale took place on

the set date and that the property was sold to the highest bidder, the 5<sup>th</sup> Defendant. It is then that he applied to have the property vested in the 5<sup>th</sup> Defendant which was allowed on 21<sup>st</sup> March 1994. DW1 contended that the 3<sup>rd</sup> Defendant only facilitated the completion of the lower court suit as it was among many cases it was handling for the 1<sup>st</sup> Defendant. That it did not leave a personal interest in the matter. That the matter was instituted by the 1<sup>st</sup> Defendant and he never attended the auction. According to the witness, the allegation of fraud has no basis. That the letter dated 28<sup>th</sup> July 1994 seeking extension of the auction long after it had been carried out must have been drafted by mistake as the 3<sup>rd</sup> Defendant was handling many matters for the 1<sup>st</sup> Defendant. According to him, the matter was conducted above board and that is why the Plaintiff's application in the lower court seeking to set aside the sale failed.

Upon cross-examination, he explained that the letter dated 26<sup>th</sup> April 1993 does not bear a court stamp, shows a different amount from what is claimed in an earlier letter because after conducting a search of the Defendant, when he came on record and found out that the full name was that of the Plaintiff, he changed it to the Plaintiff's name. This search was however not available and neither was the notice of change of advocates from the previous Advocates who had handed the matter to the 3<sup>rd</sup> Defendant. What motivated the search is that it is common knowledge that a company can never be registered in initials. That the decision to search Allied and not any other name bearing the letter 'A' was informed by the postal address given in the Plaint. However, the plaint does not give the postal address of the Plaintiff. That to get the postal address, he used the directory as it normally carries both the initials and full names.

He was categorical that he could not explain the reason for not amending pleadings even after discovering A. Investment Limited was actually the Plaintiff. That prior to the discovery, no record showed the full name of the Plaintiff. He could not explain why he did not seek to know why the previous Advocate had used different names from those contained in the directory. He maintained that though he knew that non-publication of advertisement for auction was one of the grounds of fraud, he did not have the copies of the advertisements as these should have been produced by the 4<sup>th</sup> Defendant.

The 'order of the Bailiff' gives the wrong date of sale as 26<sup>th</sup> August 1994 which must have been done by mistake as the auction had already taken place by that time. Similarly, the letter from the 3<sup>rd</sup> Defendant requesting for an extension of the auction date to 26<sup>th</sup> August 1994 must have been written in error as the sale had already taken place.

That he couldn't tell whether a valuation of the suit land had been done before sale as that was the 4<sup>th</sup> Defendant's job. According to him, the price of the suit land was a normal forced sale price.

In re-examination, the witness insisted that he was not an employee of the 1<sup>st</sup> Defendant but only acted as an advocate. That it would not have been normal to amend pleadings after judgment. Thus the correspondence from the 3<sup>rd</sup> Defendant depended upon the pleadings drawn by the 1<sup>st</sup> Defendant's earlier representatives. That the documents which bear discrepancies were prepared by the Court but those prepared by the 3<sup>rd</sup> Defendant with discrepancies were done in error.

That was the totality of the evidence adduced in Court. The Parties filed written submissions. As earlier noted, the claim as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants abated during the pendency of this suit. That means the claim is now against the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

The Plaintiff has pleaded and alleged fraud against the Defendants. The law is trite that fraud ought to be pleaded with meticulous particularity and proved strictly **Okere v Kinyukia & Others [2007] 1 EA 304** and **Ratilal v Lalji [1954] EA 314**. Has the Plaintiff proved its case to the required standards? Though the standard of proof is still on a balance of probabilities in fraud cases like in all civil cases, it is certainly higher than the ordinary proof but below proof beyond reasonable doubt.

The first issue that points to fraud is the fact that the suit for recovery of rates instituted by the 1<sup>st</sup> Defendant in the lower court (Nairobi RMCC No. 13 of 1991) was against different entity from the

Plaintiff by the name of A. Investment Limited. Although this could have been a genuine mistake or error on the part of the 1<sup>st</sup> Defendant the fact that it engaged an Advocate -the 2<sup>nd</sup> Defendant, meant that it would have been advised that companies are never registered using initials. The 2<sup>nd</sup> Defendant conceded to this and pointed out the anomaly especially considering that in some documents, for example the application for decree to court, the names of the Plaintiff appear correctly.

Section 26 of the Rating Act, Cap 267 states –

**“26. Publication and service of notices, etc.**

**(1) Except where otherwise provided by this Act, any notice required to be published under this Act by the rating authority shall be published by advertisement once in the *Gazette* and in one or more newspapers circulating in the municipality.**

**(2) Any notice, demand or other document required or authorized to be sent or served under or for the purposes of this Act may be sent or served either—**

**(a) by delivering it to the person to or on whom it is to be sent or served; or**

**(b) by leaving it at the usual or last known place of abode or business of that person, or, in the case of a company, at its registered office; or**

**(c) by ordinary or registered post; or**

**(d) by delivering it to some person on the premises to which it relates, or, if there is no person on the premises to whom it can be delivered, then by fixing it on or to some conspicuous part of the rateable property; or**

**(e) by any method which may be prescribed:**

**Provided that, if the rating authority, having attempted to send or serve a notice, demand or other document by one of the methods provided in paragraphs (a), (b), (c), (d) and (e) of this subsection, has reason to believe that such notice has not been received by the person to whom it was addressed, it may advertise, in the manner provided in subsection (1) of this section, the general purport of such notice, demand or other document, and thereupon such notice, demand or other document shall be deemed to have been received by such person, and any such advertisement may refer to one or more notices, demands or other documents and to one or more rateable owners.**

**(3) Any notice, demand or other document by this Act required or authorized to be served on the owner or occupier of any premises may be addressed by the description “owner” or “occupier” of the premises (naming them), without further name or description.**

**(4) When any notice, demand or other document required or authorized to be sent or served under or for the purposes of this Act has been sent by ordinary or registered post, delivery or service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which a letter would be delivered in the ordinary course of the post.”**

The 1<sup>st</sup> and 4<sup>th</sup> Defendants having not called any evidence to support their respective cases and having not followed the procedure as outlined for the recovery of rates seem to have conceded to the fact that fraud did indeed take place during the sale of the suit land. The documents presented in court by the Plaintiff portray grave inconsistencies as to when the auction took place and whether it was advertised as is the mandatory requirement. The 2<sup>nd</sup> Defendant was at pains to explain all the inconsistencies starting from the name of the rates defaulter, dates of the auction and letters which originated from his office which left a lot of questions unanswered on whether an auction actually took place or not. It was highly irregular for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants to act on an individual’s property in such nonchalant manner.

Having found that the procedure of disposing off the suit land due to non-payment of rates was flawed and full of irregularities, the Plaintiff is entitled to the relief sought in prayer a of the plaint. I will grant it the current value of the suit land which will be determined after valuation is carried out by a Registered Valuer agreed to by the parties.

However, as the Plaintiff has not demonstrated that it had paid the rates from the year 1976-1989 it is not entitled to any damages even though it has been kept out of its property for these many years.

The Plaintiff will have costs of the suit. There will be judgment accordingly.

**Dated and Delivered at Nairobi this 24th Day of November, 2015**

**A. MBOGHOLI MSAGHA**

**JUDGE**