



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND COURT APPEAL NO. 156 OF 2011

NATIONAL BANK OF KENYA.....APPELLANT

VERSUS

JOHN OSUMO OMBASA.....RESPONDENT

JUDGMENT

1. The appellant the National Bank of Kenya Limited who were the 2nd defendant in the suit before the subordinate court have appealed against the judgment of the Resident Magistrate **Hon. P. L Shinyada** delivered on 6th July 2011. The learned Resident Magistrate in entering judgment in favour of the plaintiff in the lower court held that the 1st defendant was the agent of the 2nd defendant and as such agent was authorized to conduct the auction sale of land title **West Mugirango/Siamani/1565** and that the 1st defendant's actions were binding to the 2nd defendant.

2. The learned magistrate found and held that the plaintiff had proved his case on a balance of probabilities and entered judgment in favour of the plaintiff for:

- i. **An order declaring the plaintiff a bonafide purchaser for value of LR No. West Mugirango/Siamani/1565.**
- ii. **An order directing the transfer of land parcel No. West Mugirango/Siamani/1565 to the plaintiff.**
- iii. **An order awarding the cost of the suit to the plaintiff.**

3. The appellant being aggrieved by the learned Resident Magistrate's judgment has appealed to this court as per the memorandum of appeal dated 2nd August 2011 subsequently amended on 18th July 2014 with leave granted by the court on 10th July 2014 when the court also directed the appeal to be argued by way of written submissions. The appellant has by the amended memorandum of appeal listed 10 grounds of appeal. The 1st through to the 6th ground of appeal deal with the learned magistrate's evaluation of the evidence and treatment of the submissions. The appellant in these grounds contends that the trial magistrate erred in her appreciation of the evidence adduced thereby reaching the wrong finding. This court as a court of first appeal is duty bound to evaluate the evidence before her tendered before the trial court and determine whether the trial court had properly assessed the evidence in arriving at the decision that it did. This court is entitled and indeed required to review the evidence adduced before the trial court and come to its own conclusion. The court nonetheless will not interfere with any findings of fact by the

trial court unless it is shown the trial court arrived to such findings by applying wrong principles.

4. The other substantive grounds 7 to 10 in the memorandum of appeal which I set out hereunder raise substantive issues of law which I will consider hereinafter in the course of my judgment.

7. That the learned trial magistrate erred in law and in fact in declaring the respondent bonafide purchaser when the respondent had not met all the conditions precedent.

8. That the learned trial magistrate erred in fact and in law failing to find that she had no jurisdiction to hear or determine the matters in issue in the suit.

9. That the learned trial magistrate erred in fact in finding that the respondent was a bona fide purchaser and for value, inspite of evidence adduced to the contrary, inter alia, that no value was given by the respondent, purchaser at the subject auction.

10. That the learned trial magistrate erred in upholding the sale and attributing liability to the appellant inspite of clear evidence of the sale by the 1st defendant in the suit having been conducted contrary to the appellant's express instructions.

The appeal was argued by way of written submissions. The appellant filed its submissions dated 25th March 2015 in court on 26th March 2015 while the respondent's submissions dated 12th May 2015 were filed in court on 17th June 2015.

5. The brief facts of the case before the trial court are that National Bank of Kenya Ltd, the 2nd defendant in the suit instructed the 1st defendant, Shenya Services to advertise and sell land parcel **West Mugirango/Siamani/1565** by public auction pursuant to the Bank's power of sale as chargee of the said property. The 1st defendant advertised the property for sale by public auction on 8th May 2009 at Nyamira town. One, **Mr. Bernard Masira Ombasa** who testified at PW1 stated that he attended the auction as a representative of his brother, **John Osumo Ombasa** and bid for the property at kshs. 300,000/= and that his bid was the highest which the auctioneer accepted and he was declared the purchaser of the property. PW1 stated that he signed the memorandum of sale in the name of his brother since he was representing him as his brother was out of the country in the United States of America. As per PW1 testimony although he was declared as the highest bidder he did not pay the 25% deposit at the fall of the hammer but rather paid the full purchase price of kshs. 300,000/= by a bankers cheque dated 11th May 2009 drawn in favour of the bank which was handed to the auctioneer.

6. PW2 Charles Okemwa Orango testified that he accompanied PW1 to the auction at Nyamira on 8th May 2009 whereby PW1 bid for the property at kshs. 300,000/= which the auctioneer accepted. PW2 stated that he signed the memorandum of sale issued by the auctioneer as a witness. The witness confirmed that the cheque for kshs. 300,000/= was paid on 11th May 2009 to the auctioneer in Kisii town. The witness stated the auctioneer signed the memorandum of sale on behalf of the bank.

7. The 2nd defendant's case was that the auctioneer, the 1st defendant was instructed by the bank to sell the suit property by public auction and that the sale was duly scheduled on 8th May 2009 at Nyamira town. The 2nd defendant's position was that the sale was subject to a reserve price which the bank had expressed to be kshs. 320,000/= and therefore the offer price of kshs. 300,000/= by the plaintiff did not meet this condition and the same ought to have been rejected by the auctioneer. The 2nd defendant stated that this condition was explicitly included on the conditions and terms of sale and the plaintiff therefore had notice that the sale was subject to a reserve price. Inter alia the conditions of sale set out in the notification of sale of public auction by the auctioneer included:-

i. All interested purchasers are requested to view the properties and verify the details for themselves, as these are not warranted by the auctioneers or the charges.

ii. A deposit of 25% of the sale price must be paid in case or banker's cheque at the fall of the hammer and the balance within ninety (90) ninety days to the charges.

iii. The sale is subject to reserve price and land control board where applicable.

iv. The auctioneer reserves the right to reject any bid without giving reasons for so doing.

8. It was further the 2nd defendant's case that no 25% deposit was paid at the fall of the hammer and that the person who bid at the auction did not disclose that he was not the plaintiff and/or that he was representing the plaintiff at the auction. PW1 signed the memorandum of sale and held himself out as the plaintiff which was a clear case of impersonation and hence a criminal act.

9. DW1 testified on behalf of the 2nd defendant and stated that DW2 instructed him to attend the auction as a representative of the bank. DW1 had a memo that was advising what the reserve price of the suit property was which he confirmed he handed over to the auctioneer before the sale was conducted. The witness testified that the auctioneer distributed the terms and conditions of the sale to the potential buyers before conducting the sale and hence the bidders at the auction sale had notice of what the terms and conditions of the sale were. DW1 testified that there was a bid of kshs. 300,000/= which he could not ratify without authority from the bank and that when he called his boss at the bank he was requested to go back to the bank. He stated no money was paid by the bidder at the auction.

10. DW2 another bank official testified that he deputed DW1 to attend and represent the bank at the auction sale and he handed over the memo from the bank's head office fixing the reserve price of the suit property at kshs. 320,000/= to be given to the auctioneer. The witness testified that the property was not to be sold below the reserve price. The witness further testified the alleged bidder at the auction did not pay the 25% at the fall of the hammer as per the terms of sale. The witness further testified the auctioneer forwarded to the bank a banker's cheque for kshs. 300,000/= dated 11th May 2009 on account of the purchase price but the bank did not accept the cheque as the amount was below the reserve price of kshs. 320,000/=. The cheque was returned to the auctioneer and according to the witness the money was never received by the bank. The witness urged the suit by the plaintiff to be dismissed as the conditions of the sale were not met as the bid fell below the reserve price and at any rate no deposit was paid at the fall of the hammer.

11. Having reviewed the evidence that was tendered before the learned resident magistrate the issues for determination in this appeal is whether the learned trial magistrate arrived at the correct findings of fact and law on the basis of the evidence adduced before her. The following specific issues arise from the evidence tendered by the parties:

i. Whether PW1 was acting as an agent of the plaintiff at the time he attended the auction.

ii. Whether the terms and conditions of the auction sale were met so that a valid contract of sale came into being between the plaintiff and the bank.

iii. Whether an order for specific performance of the contract of sale is available to the plaintiff.

12. As per the evidence PW1 states he attended the auction sale as a representative of his brother the plaintiff who was then away in the United States of America (USA). The fact was not disclosed to the auctioneer and/or the bank's representative who was at the auction. PW1 placed the bid apparently in the name of the plaintiff and signed the memorandum of agreement as the plaintiff and even gave the details of the plaintiff's identification as his. PW1 was not the plaintiff and could not be identified as the plaintiff yet he presented himself as the plaintiff. How then could he metamorphose and become the agent of the plaintiff? He was not an agent as he presented himself as the plaintiff and even went ahead to execute the memorandum of sale as the plaintiff. PW1 was but an impostor and it matters not that he may have had instructions from the plaintiff to attend the auction on his behalf. Why did he hold himself out as the plaintiff when he knew the plaintiff was thousands of miles away? That was out right impersonation which the court ought not to condone. There would have been nothing wrong for PW1 to

present himself as a representative of the plaintiff and to bid at the auction on his behalf but to purport to be the plaintiff and to sign off the memorandum of sale as the plaintiff would in my view not be acceptable. If it was not the plaintiff seeking to enforce the contract against the bank, it would not be possible for the bank to enforce the contract against the plaintiff as the plaintiff would merely aver and show that there was no way he would have been present to participate at the auction on the material date when he was actually in the USA and would loudly proclaim that the signature attributed to him was a forgery. I would thus on this ground alone set aside the purported auction sale.

13. The appellant has further argued the terms and conditions of sale at the auction were not met and therefore there could not have been a valid sale. The appellant has submitted that the sale was subject to a reserve price of kshs. 320,000/= which was not realized and hence the bid for kshs. 300,000/= should have been rejected. The appellant has further submitted that the bidder at the auction did not pay a deposit of 25% of the bid price at the fall of the hammer as required under the terms and conditions of the sale and therefore the sale contract did not come into force. That the sale was subject to a reserve price and that a 25% of the purchase was to be paid at the fall of the hammer were express terms which the bidders at the auction had notice of.

14. The Auctioneers Act Cap 526 of the Laws of Kenya under section 21(3) provides for auction sales to be subject to a reserve price and the same provides thus:-

Section 21 (3) It shall be stated in the particulars or conditions of any sale by auction of any property whether such sale shall be subject to a reserve price or not or whether a right to bid is reserved.”

My view is that once an auction sale is expressed to be subject to a reserve price this becomes a fundamental term of the contract and the sanction of the party who has placed the reserve price becomes a mandatory requirement if the property is to be sold below the reserve price. In the instant case it was necessary for the plaintiff to prove and show the bank approved the sale. It was not enough to say that the auctioneer who was the agent of the bank accepted the bid. The evidence on record from DW2 is to the effect that the bank refused to accept the banker's cheque for kshs. 300,000/= presented to the bank by the auctioneer as the purchase price on the basis that the same fell short of the reserve price for the property. The appellant has referred the court to the text **“Benjamin's sale of Goods”** paragraph 2-006 page 113 and the relevant excerpt is as follows:-

“Sale subject to reserve price.

Where notice has been given that a sale is subject to a reserve price, the act of the auctioneer in knocking down goods to a bidder is not a conclusion acceptance if the reserve price has not in fact been reached.”

15. The refusal by the bank to accept the cheque of kshs. 300,000/= was an unequivocal act that they did not approve the sale as the condition of the offer matching the reserve price had not been satisfied. It is my view that the bank was in order in rejecting the offer by the purchaser at the auction as an express term or condition of the sale had not been met or satisfied. The failure by the purchaser to pay a deposit of 25% of the purchase price at the fall of the hammer as required under the terms of the sale and further to pay the purchase price of kshs. 300,000/= on 11th May 2009 three days later is an irregularity that was not explained and points to the possibility of complicity between the auctioneer and PW1. The auctioneer acted **ultra vires** in varying the express terms of the sale and his actions cannot bind the bank. It is my view that the learned trial magistrate erred on the basis of the evidence tendered before her in finding and holding that there was a valid sale by public auction that could be enforced. There was no such valid sale.

16. On the evidence adduced before the trial magistrate the plaintiff did not participate in the auction sale and the person who participated impersonated the plaintiff in all respects and he cannot say he was representing the plaintiff. The plaintiff did not give PW1 a power of attorney until after three (3) months after the date of the sale. The conditions and terms of the sale were equally not met and there could not have arisen a valid contract of sale that could specifically be enforced and therefore there was no basis

upon which specific performance could be ordered.

17. The net result is that this appeal is allowed and the judgment of the Resident Magistrate dated 6th July 2011 is hereby set aside and substituted with an order dismissing the plaintiff's suit before the subordinate court with costs. The appellant is awarded the costs of this appeal.

Judgment dated, signed and delivered at Kisii this 13th day of November, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

N/A for the appellants

N/A for the respondent

J. M. MUTUNGI

JUDGE