



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENT AND LAND CASE NO. 78 OF 2012
(FORMERLY HCCC 68 OF 2005)

MARTHA ONGOCHEPLAINTIFF

VERSUS

ALLAN W. NJUGUNA ALIAS MWIRERI1ST DEFENDANT

ROBERT WERU T/A KOWAMA ENTERPRISES ...2ND DEFENDANT

BARCLAYS BANK OF KENYA LTD.....3RD DEFENDANT

ELIZABETH WAMALWA4TH DEFENDANT

THE LAND REGISTRAR, BUNGOMA5TH DEFENDANT

JUDGEMENT

[1] The plaintiff's claim is that on 2nd November 1995 the 5th defendant registered an illegal charge in the encumbrances Section of the suit land in favour of Barclays Bank to secure Kshs 100,000.00. The plaintiff avers that the charge was illegal because the advocate who attested the signing of the charge under Section 65(1) of the Registered Land Act, one Elizabeth Wamalwa did not hold a valid practicing certificate when she attested the charge.

[2] The plaintiff further contends that pursuant to the said charge, the Land Registrar upstamped The charge on 2nd November 1993 to cover an additional Kshs.130,000.00, further that on 20th November 1996 the land registrar purported to upstamp the charge to cover an additional Kshs 100,000.00 It is alleged that the said upstamping is an illegal act and an undertaking unknown to the Laws of

Kenya and in so doing both the 3rd and 5th defendants acted illegally.

[3] Further the plaintiff challenges the third defendant's power of sale created under the charge. The notices issued pursuant to that power on 6th March 2003 and states that the notification of sale was null and of no effect for the reasons that one, it referred to E. Bukusu/S. Kandy/6532 as opposed to the plaintiff's land 6352. Two, that the notice gave 36 days to redeem the charge as against the statutory period of 45 days.

[4] The plaintiff finally challenged the sale and argued that his property was sold for Kshs.500,000/= When it was worth more and that the sale to the 1st defendant was in breach of Rule 15(e) of the

Auctioneers Act in that the Auctioneer did not allow 14 days from the date of notification to the date of the sale. He finally pleaded that he needs accounts taken to differentiate the amounts owed to the 3rd defendant bank.

[5] The plaintiff requested for an injunction against the 1st defendant from taking possession or entering or attempting to evict the plaintiff from the suit land. He also asks for an order to declare the sale of the suit land a nullity and an order to rectify land parcel East Bukusu/S. Kaduyi/6352 and cancellation of the entries No. 4 and 5 of the same and costs of the suit.

[6] In her evidence, the plaintiff told the court that she was the previous registered owner of East Bukusu/S. Kanduyi/6352. That in 1993 she obtained a loan from Barclays Bank for Kshs.100,000/= and she executed a charge dated 25/10/93 witnessed by Elizabeth Wamalwa Advocate produced as P2. She said she signed a further charge in 1998 for Kshs.130,000/= witnessed by Simiyu Makhoha Advocate produced as P3. She said she paid back the loan. She stated that on 18/3/2003 she was issued with a notice by the 2nd defendant. The notice was for East Bukusu/S.Kanduyi/6532 which was not her property. She said that her property was East Bukusu/S.Kanduyi/6352. That the notice was to take place on 23/4/2003. That she was given 36 days instead of 45 days. The notice was produced as exhibit 4. She produced a letter from the Law Society of Kenya to show that Elizabeth Wamalwa Advocate had no practicing certificate when she attested the charge. She produced the green card of the suit land and the charge for Kshs.100,000/=. The plaintiff stated that her land was sold for Kshs.500,000/= which she said was an under value . She said the bank was demanding Kshs.1 million from a loan of Kshs.230,000/=. She said she wanted accounts from the bank. She prayed for an order to restrain the first defendant from harassing her.

[7] On cross examination by counsel for the defendant Mr Ocharo, she admitted that she took a total of Kshs.430,000/= loan from the 3rd defendant Bank. She also admitted that she had no proof of any payments made to settle the loan. She said that she does not know what she paid to date. That she gave as security for the money for her land parcel No. East Bukusu/S.Kanduyi/6352 and that she knew the consequences were that her property would be sold if she defaulted. She admitted that she is the one who took the charge document to the 4th defendant to attest her signature and that the signature of the Bank Attorney was attested by a different advocate and the document was made by M/s Kaplan and Stratton Advocates. Further, that for the second charge she is the one who took to Makhoha advocate for attestation. She admitted that she had not cleared her indebtedness with the bank when this suit was filed and that in her prayers herein she did not deny that she was in default. She averred that her complaint was that the amount was exaggerated. That when she received the notice she knew it was her land which was being sold . She said in re-examination that she does not know the exact value of her land. That there was no valuation after the property was developed. The plaintiff called no witness and she closed her case.

[8] The first defendant filed his defence, he admitted para 7 of the plaint, he denies para 7,12, 13 and said he was unaware of paragraphs 14 and 15, 17 and 18 and put the plaintiff to strict proof thereof. He denied that the purchase of the land for Kshs 500,000/= was an under valuation. He stated in para No. 13 of his defence that he was bona fide and as a purchaser he was not obliged to find out about the notices issued to the plaintiff to realise the security or whether the power to do so was exercised as authorized. He denied that the plaintiff was entitled to the orders prayed in the plaint.

[9] In his evidence in court he said that he is a businessman and that on 2nd April 2003 he saw an advertisement of land to be sold near Bungoma. The land was in the name of the plaintiff. He produced a newspaper cutting for the same. He said he learnt that the bank that was selling was Barclays Bank. He attended the sale and was the highest bidder at Kshs.500,000.00. He paid the whole amount. He said that the bank thereafter transferred the land to him. He said that he has now charged the land to Equity Bank. He prayed for compensation for the period he has not used the land.

[10] The 5th defendant filed his defence on 7th March 2006. He admitted para 1,2,3,4,5 in as far as they are descriptive and said that he was a stranger to para 7,8,9,10,11 and 12 of the plaint.

He denied that the registration of the encumbrance was illegal. He denied all the other averments of para 14,15,16,17,18,19,20 and 23 of the plaint.

He said that the suit was bad in law in not complying with Section 13A of the Government proceedings Act.

[11] The land registrar gave evidence on 13/5/2015. He said that land parcel East Bukusu/S.Kanduyi/1652 was first registered in the name of Boniface Wamalwa Hirano. The second registration was in the name of Martha Ongochi. That on 2/12/93 a charge was registered against the parcel for Kshs.100,000.00. He said that the current registered owner is Alan Wachumbu Njuguna the 1st defendant under a process of sale. He produced various documents for the sale including stamp duty payment and upstamping of various charges. He said upstamping was done with instructions of the charger to cover additional facilities. He explained that upstamping a charge is also known as a further charge. He produced the further upstamping of further charge as D exhibit No. 5. He explained that upstamping is done when there is a registered charge document between the chargee and the chargor.

[12] There was no input from the Auctioneer, Barclays Bank and Elizabeth Wamalwa advocate. The bank entered appearance on 9th August 2005 through Oraro and Rachier advocates but did nothing else. A request for judgement against the 1st and 4th defendant was made on 17/9/2005 and paid for on 19/9/2005. The judgement against the first defendant 5th defendant were apparently set aside as they proceeded with the suit.

Judgement was entered against the 3rd defendant on 9/12/2005.

The case for the defendant was therefore closed.

[13] The plaintiff, the 1st defendant and the 5th defendant had agreed on the statement of agreed issues on 23/12/2010. They set out some 21 issues of the case as follows:

- (1) Whether the plaintiff at all material time was the registered owner of that parcel of land comprised in the Title number East Bukusu/South Kanduyi/6352*
- (2) Whether the charge that was registered over the above mentioned title on the 2nd November 1993, was illegally so registered.*
- 3. Whether the plaintiff's claim to challenge the legality of the registration was time barred as at the time this suit was being commenced.*
- 4. Whether the up stamping of the charge registered on the 2nd November 1993, and therefore entries No. 4 and 5 in the encumbrances section of the suit property were illegal.*
- 5. Whether the 3rd defendant would exercise the statutory power of sale under the provisions of the registered Land Act.*
- 6. Whether the 3rd defendant's instructions to the 2nd defendant were justified, lawful and regular.*
- 7. Whether there was any notification of sale by the 2nd defendant to the Plaintiff of the intended sale by public auction of the suit property.*
- 8. Whether if the answer to 8 above is in the affirmative, the said notification was regular, not fraudulent and lawful.*
- 9. Whether there was any breach of the provisions of Rules 15(d) and 15(e) of the Auctioneers Rules.*
- 10. Whether the property quoted in the letter of instruction by the second defendant as the subject of sale was the proper property.*
- 11. Whether the notification of sale issued by the 2nd defendant to the plaintiff was null and of no effect for referring to the property not registered in the plaintiff's names.*

12. Whether the notification of sale amounted to proper and sufficient notice as is required by law.
13. Whether the sale of the plaintiff's property by the 2nd defendant to the 1st defendant was at a gross under value.
14. Whether the sale of the plaintiff's land parcel number East Bukusu/South Kanduyi/6352 was fraudulent and illegal.
15. What would be the consequences of non compliance of the provisions of the cited Auctioneers' Rules.
16. Whether the 1st defendant was a purchaser without notice.
17. Whether, if he was, he could acquire a proper title to land parcel
 number East Bukusu/South Kanduyi/6352.
18. Whether notice to institute suit was issued to the 5th defendant.
19. Whether, if the answer to r above is in the negative, what would be the consequences of the same.
20. Whether the plaintiff's suit can be sustained.
21. Who should be condemned to pay costs of this suit.

[14] Judgement in this case was entered against the 2nd, 3rd and 4th defendants. This was conceded by M/s Mumalasi learned counsel for the plaintiff on 23/3/13. I shall deal with the issues raised herein having that in mind. The backbone of the plaintiff's case was that the charge was illegally registered. They base their claim on the fact that the charge was attested by the 4th defendant M/s Elizabeth Wamalwa who had no practicing certificate when she did so. The plaintiff relies on Section 36 of the advocates act, and she celebrated case of *National Bank of Kenya Ltd. Versus Wilson Ndolo Ayah CA No. 119 of 2002(UR)* and *John Kuria Mathenge T/A Aberdare Filling station versus Caltex Oil (K) Ltd and another Nairobi HCCC No. 677 of 2005*. The case herein can be distinguished with those two cases in that the document in issue herein was not drawn or prepared by the 4th defendant. She only attested the signature of the plaintiff. The document was taken to the 4th defendant by the plaintiff herself for attestation. The charge was drawn by M/s Kaplan and Stratton advocates. The further charge was witnessed by Mr. Makhoha Advocate. The plaintiff is in other words asking the court to allow her to benefit to the detriment of the 3rd defendant, and escape from a charge, she herself signed and took on her own free will, to an advocate of her choice, for attestation and an advocate who turned out to be unqualified. For that reason only, she calls the charge illegal.

[15] The Supreme Court of Kenya in *petition No. 36 of 2004 National Bank of Kenya Ltd Versus Anaj Warehouse Limited* while dealing with Section 34 and the *Ndolo Ayah Case* a foresaid stated:

[62] *By virtue of the financial arrangements between the parties in Ndolo Ayah, monies belonging to the appellant are held by the respondent, and it is held to be irrecoverable, just on the policy ground that the courts ought to be seen to deter illegality. The illegality stems from the fact that the conveyance was prepared by an advocate who at the material time, did not hold a current practicing certificate. However, such illegality, in our view, is by no means as manifest as that of unjust enrichment, conferred upon the borrower. Could Parliament have intended, by Section 34 of the Advocates Act, the perpetration of such an injustice?. The injustice, indeed, multiplies, and subsumes the plane of public interest, in view of the fact that the monies in question were drawn from a public financial institution.*

[63] *To hold that monies lent in conformity with the provisions of the law, save that the relevant conveyancing instruments were drawn by an advocate who at the time did not hold a practicing certificate, are not recoverable, would be to sanction unjust enrichment for unscrupulous borrowers, while depriving innocent lenders – creating a wide scope for fraudulent borrowing, Such a position in law, in our view, does not represent an “announced rule” – precedent that should guide the disposal of the matter now before us. Just as the law frowns upon unscrupulous lenders, especially those whose actions would fetter the borrower's equity of redemption, so also must it frown upon unscrupulous*

borrowers, whose actions would extinguish the lender's right to realize his or her security. There is to be, in law, a substantial parity of rights-claims, as between the lender and the borrower.

[64] The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly licensed advocates, the public would know if a particular advocate had not taken out a practising certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers? We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practicing certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practising certificate.

Pursuant to the above quoted judgement which binds all courts in this country, I find that the charge created by the parties herein was not illegal.

The plaintiff raised one issue of whether upstamping was legal or illegal. The Land Registrar explained that upstamping was just another name of further charge meaning that there is already a valid charge between the parties. The charge being for a specific amount of money. The stamp duty applied being the amount the charge declares. If the charger applies for more funds on the security charged, an extra stamp duty will have to be paid on that amount. This is what banks call upstamping of the charge to comply with the stamp duty act. Otherwise, the charge document cannot be used in court as a contract between the parties if the stamp duty for extra amount given by the chargee to the chargor is not paid. In that regard Section 19 of the Stamp Duty Act provides as follows:-

19(1) Subject to the provisions of sub section (3) of this section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except-

- a. in criminal proceedings; and*
- b. in civil proceedings by a collector to recover stamp duty.*

unless it is duly stamped.

2. No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

3...

4...

5...

In my view, I do not think anything turns on this issue at all.

[16] The issues No. 5, 6, 7, 8, 9, 10, 11, 12, 13 & 20 are issues against the 2nd and 3rd defendants. The plaintiff having obtained judgement against them and the interlocutory judgement having not been set aside, I need not make any findings on them. It is for the plaintiff to pursue her judgement if she so wishes, on whether the 2nd, 3rd and 4th defendants are liable in damages which seems to me to be the only option available.

As for issue No. 14, I have no doubt that the 1st defendant was a bona fide purchaser for value without notice. He saw the advertisement for sale of the suit land on the newspaper. He attended the sale for East Bukusu/South Kaduyi 6352. He paid Kshs.500,000/= cash. The title was transferred to him by the bank. He has now charged the same to Equity Bank. There was an effort by the plaintiff to allege that the property was under valued. The plaintiff on oath said that she had no valuation of her plot. What then is the basis of saying the property was under valued?. There was no evidence at all by the plaintiff to prove

that the 1st defendant was not a bona fide purchaser. He was indeed an innocent purchaser for value.

[17] The purchase of the suit property by the 1st defendant cannot be vitiated or faulted. He obtained good title. If the plaintiff is unhappy about the sale, the notices thereof, the way it was conducted, then her recourse is not with the 1st defendant at all. The 1st applicant asked for damages for failing to use his land as the same is still occupied by the plaintiff. He did not prove any damages before the court and I will not order any. However, I order the plaintiff to move and vacate out of the suit land. I also find no fault with the Land Registrar in registering the charge, upstamping the further charges and in registering the transfer of East Bukusu/South Kanduyi/6352 in the name of the 1st defendant.

[18] What is strange in this case is that the plaintiff who filed this case admits taking banking facilities of Kshs.430,000.00 from M/s Barclays Bank the 3rd defendants herein. She used the suit land as security. She admits that she never made any payments at all to the bank. She admits that she had not paid that money when she filed the suit. She complained in her suit that the money borrowed was exaggerated, she had not repaid the loan, yet, she files this suit against the 3rd defendant asking for an account. This issue of payment should have been the first issue in this case. It is apparent that she never repaid the loan borrowed from the bank. The bank was well within its rights to exercise its statutory power of sale.

The case against the 1st defendant is dismissed with costs. The case against the 5th defendant is also dismissed with costs.

It is so ordered.

Dated at Bungoma this 23rd day of December 2015

S.MUKUNYA

JUDGE

Judgement delivered in open court in presence of

Gladys court assistant

Ms Musumba for Mumalasi for the plaintiff and Mr. Ocharo for the first defendant.

MUKUNYA - JUDGE

23/12/2015