



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 4275 OF 1994

NICHOLAS RUTHIRU GATOTO.....PLAINTIFF

VERSUS

NDARUGU MERCHANTS.....1ST DEFENDANT

STEPHEN BORO GITIHA.....2ND DEFENDANT

RURAL URBAN CREDIT FINANCE LIMITED.....3RD DEFENDANT

(UNDER RECEIVERSHIP)

J U D G M E N T

1. The suit was commenced by way of a Plaint dated 22nd December 1994 which was later amended on 19th September 1996. The Plaintiff prays for judgment jointly and severally against the Defendants for:-
 - a. *An order restraining the 2nd Defendant his servants or agents from trespassing or in any other manner or (sic) interfering with the Plaintiff's enjoyment of parcel Land Number KIGANJO/KIAMWANGI/208.*
 - b. *A declaration that the sale of L.R Number KIGANJO/KIAMWANGI/208 by the 1st and 3rd Defendants to the 2nd Defendant and the transfer together with the title deed issued pursuant thereto a nullity.*
 - c. *An order directing the Registrar of Lands, Kiambu Lands office to cancel the title issued to the 2nd Defendant and restore the Plaintiff's title to land parcel Number KIGANJO/KIAMWANGI/208.*
 - d. *Damages for loss of use of Land Parcel Number KIGANJO/KIAMWANGI/208.*
 - e. *Costs of this suit.*

f. Any other order and or relief that the Honourable Court may deem just and fit to grant.

2. Briefly, it is averred in the Plaint that on or about 9th June 1982 the Plaintiff was lent the sum of Kshs. 180,000/= by the 3rd Defendant payable at monthly instalments of Kshs. 7,400/=. It is further averred that the Plaintiff continued making his monthly instalments until a dispute arose as to the sum of money owed by him to the 3rd Defendant. As a result, the Plaintiff demanded an up to date account.
3. However, instead of furnishing the Plaintiff with the said accounts, it is averred that the 3rd Defendant caused the Plaintiff's land parcel No. KIGANJO/KIAMWAGI/208 (herein the "suit property") to be advertised for sale. It is averred that the Plaintiff approached the receiver of the 3rd Defendant who assured him that no sale would take place as the advertisement was by mistake.
4. Thereafter, that is sometime in November 1994, it is averred by the Plaintiff that the 2nd Defendant started trespassing on the suit premises alleging that it was sold to him by the 1st Defendant. It is further averred that the Plaintiff did a search and discovered that the said sale was fraudulent since the same did not comply with the law. The particulars of fraud are set out at paragraph 13 of the Plaint. The Plaintiff's case is that the sale was fraudulent, illegal and the resulting title deed should be cancelled.
5. The Defendants have denied the Plaintiff's claim through their written statements of Defence.
6. The first Defendant filed a Statement of Defence dated **2nd May 1997** on even date. In the said Defence, it is stated that the third defendant instructed the first defendant to advertise for sale and in default of payment sell the suit property by public auction. The first defendant further states that the auction took place at Kiganjo shopping centre and that they sold the suit property to the highest bidder at **Kshs. 750,000/=**. According to the first defendant the said sum was a fair and just price of the suit property in the circumstances.
7. The Second Defendant filed his Defence on **23rd April 1997**. In disputing the Plaintiff's claim, the 2nd Defendant averred that a public auction was properly held on 30th June 1994 at 12.00pm at Kiganjo Township. He confirmed that he bought the suit property for a sum of Kshs. 750,000/= and the same was registered in his name on 7th October 1994. The second Defendant also denied that there was any fraud and denied all the alleged particulars of fraud.
8. The third Defendant filed a Statement of Defence dated **6th December 1996** on even date. The 3rd Defendant denied that the Plaintiff continued to pay his monthly instalments even after putting of the Company under receivership. The 3rd Defendant also denied that the Plaintiff ever asked for an updated account on his dues and averred that the suit property was only advertised after the Plaintiff failed to honour his obligation to the Defendant.
9. It is further denied by the 3rd Defendant that the Plaintiff approached the receiver of the Company and was told that the advertisement was done by mistake. It is the 3rd Defendant's case that the sale was not fraudulent and that the auction sale conducted on **30th June 1994** was strictly in compliance with the law.
10. The parties filed a list of agreed issues dated **10th July 1997**. In addition, the parties recorded a consent on **21st December 2004** to the effect that all the documents filed by all parties were admitted.
11. The hearing of this matter commenced on **2nd February 2005** before Azangalala J. The hearing proceeded on different days and was later concluded on **26th May 2011** before Njagi J. with the close of the 3rd Defendant's case. The Parties herein filed their written submissions which were highlighted before me on **11th November 2013**. Mr. Thuku appeared for the Plaintiff while Mr.

Kanyiri appeared for the 1st Defendant. The 2nd Defendant was represented by Mr. Muriithi while there was no appearance for the 3rd Defendant.

The Plaintiff's case

12. The Plaintiff called two witnesses. He testified as PW 1 and called one more witness as PW 2, a registered Land valuer.
13. It was submitted by Counsel that the 3rd Defendant did not serve the three months statutory notice which is a mandatory requirement under section 74 of the Registered Land Act Cap. 300 Laws of Kenya. Therefore, it was his submission that the power of sale did not arise under the aforesaid section.
14. It was further his submission that there was breach of **section 77 (1)** of the **Registered Land Act** which requires that a chargee should exercise the statutory power of sale in good faith. According to his submissions the 3rd Defendant did not exercise good faith as there was no statement of account to show how the debt arose, no statutory notice was issued and the suit property was sold at a gross undervalue. Therefore, it was Counsel's submissions that the net effect of the foregoing was that the purported sale was *void ab initio* and that the 2nd Defendant could not acquire good title.
15. It was also Counsel's submissions that the Plaintiff's equity of redemption had not been extinguished as the 3rd Defendant's power of sale had never arisen.

The 1st Defendant's case

16. Counsel for the 1st Defendant submitted that the sale of the suit property was conducted well and within the rules. It was his submission that in 1994 when the auction was staged the alleged Auctioneer rules were not in force. He further submitted that the 1st Defendant produced a valuation report and so the property was sold at a good value.
17. It was also Counsel's submission that the highest bidder in any auction referred to the highest bidder that complied with the rules. He confirmed that the 1st bidder bid at Kshs. 760,000/= but could not raise the 25% deposit. Subsequently, the 1st Defendant proceeded to sell the suit property to the 2nd highest bidder, who was the 2nd Defendant, for Kshs. 750,000/=.

2nd Defendant's case

18. Counsel for the 2nd Defendant associated himself with submissions for the 1st Defendant. He went ahead to submit that the statutory power of sale of the 3rd Defendant had arisen. It was his submission that the 2nd Defendant bid for the suit property and was the second bidder, who under the law, the 1st bidder having failed to comply became the highest bidder.
19. It was further submitted by Counsel that the 2nd Defendant was an innocent purchaser for value without notice. Counsel submitted that upon transfer, the Plaintiff's interest in the suit property was extinguished as the 2nd Defendant had acquired an indefeasible title. According to Counsel, any loss claimed by the Plaintiff could only arise in damages.

Plaintiff's Reply to Defendants' submissions

20. Counsel for the Plaintiff reiterated that there was no statutory notice and notice to the District Commissioner as required under the Registered Land Act. He referred to the Court of Appeal case in **Ochieng vs Ochieng Civil Appeal No. 148 of 1995** in which it was held that without a

statutory notice any sale thereafter was void and did not entitle a purchaser even if an innocent purchaser to obtain a good title to the property.

ANALYSIS

21. It is not in dispute that the Plaintiff charged the suit property herein, to the 3rd Defendant as security for a loan. It is also not in dispute that the Plaintiff owed the 3rd Defendant some money and that he had at some point defaulted in his loan repayment. Though it was not clear to the Plaintiff how much he owed the 3rd Defendant, it is trite law that a Chargee's right to exercise its statutory power of sale cannot be impeached on account of dispute as to amount owed.
22. The Plaintiff's dispute is with regard to the sale of the suit property which he avers was fraudulent, improper and illegal. PW 1 testified that he was not served with a statutory notice under section 74 of the Registered Land Act Cap. 300 (now repealed) and that he was not served with a notification of sale of the property and the 45 days redemption notice as required under the Auctioneers Rules. It was also the Plaintiff's contention that no auction took place and if there was any then it was against the auctioneers rules.
23. I will begin with the issue of the auction. From the court record there is no doubt that an auction took place. The same was advertised by the 1st Defendant, of which the Plaintiff was aware. In addition, there is a memorandum of sale on record with the details of the sale by auction on 30th June 1994. In that case I will go straight into the conduct of the auction.
24. It is the Plaintiff's case that the suit property was sold at a gross under value against the requirement of good faith subject to section 77 (1) of the RLA. (now repealed)
25. It was submitted that PW 2, a registered land valuer, faulted the valuation done by the initial valuers. It was PW 2's testimony that the initial valuation at Kshs. 650,000/= was extremely on the lower side. According to him there would be no substantial change in the value of the suit property within one year. However, PW 2 was not an independent valuer appointed by the Court and in the circumstances this Court cannot entirely rely on his evidence as a representation of the true facts.
26. It was submitted for the 3rd Defendant that it was misleading for PW 2 to say that the value of the property was kshs. 2.1 million yet he had failed to take into consideration, the fact that the valuation was done after the suit property was sold and transferred to the 2nd Defendant who had extensively developed it by the time of such valuation.
27. I will start by pointing out that the parties herein filed consent on 21st December 2004 to the effect that documents filed in court were admitted. It therefore follows that the contents therein were also admitted unless proven otherwise. The initial valuation report was compiled in November 1993 by Aradon & Co. Valuers and consultants upon being instructed by the 3rd Defendant. The valuers determined the open market value of the land at Kshs. 650,000/=. The second valuation report was compiled by Scimilar valuers upon the instructions of the Plaintiff on 29th November 1994. The valuers determined the open market value of the land at Kshs. 2.1 million.
28. The second valuation was done almost one year after the first valuation. It is discernible that the open market value as at November 1994 was significantly higher compared to the open market value as at November 1993. However, it is common ground that the value of land appreciates and therefore it is not unusual that the open market value of the suit property as determined at the latter valuation was different from the initial one which had been conducted a year earlier.
29. There is no substantial evidence in court to show that there were any anomalies in the initial valuation report. In that case, as regards the sale price of the suit property at the auction this Court

- can only make its decision based on the value of Kshs. 650,000/= given in the initial valuation. The suit property was sold almost six months after the initial valuation was done, at the sum of Kshs. 750,000/=. The forced value of the property had been given at Kshs. 430,000/=. In that case the suit property was sold at a fair market value at the time of the auction.
30. Still on the auction, it is the Plaintiff's contention that it was against **rule 17** of the auctioneer rules to sell the suit property to the 2nd highest bidder. The said rule states that "**the highest bidder shall be the purchaser subject to compliance with the conditions of sale**" (**underlining supplied**). The said rule has a rider to the effect that the highest bidder must comply with the conditions of sale. It therefore recognizes that there are cases where the purchaser might not necessarily be the highest bidder.
31. In general terms a highest bidder is the person who at an auction offers the greatest price for the property on sale and is entitled to have the property sold at his bid. However, there are circumstances where the highest bidder is unable to pay the deposit price. In such a case the auctioneer is entitled to sell the property to the next best bidder who is able to pay.
32. In the current case, the highest bidder made an offer of **Kshs. 760,000/=** but was unable to pay the deposit of 25%. The 2nd Defendant who had made an offer of Kshs. 750,000 paid the deposit and the 1st Defendant sold the suit property to him. DW 1 testified as much and produced a letter dated 1st July 1994 (**marked as DExh 4**) with the said details. I therefore find that the 1st Defendant rightfully sold the property to the 2nd Defendant.
33. Now turning to the issue of the service of the Statutory Notice under **section 74** of the Registered Land Act Cap. 300. As already stated above, it is the Plaintiff's contention that he was never served with a statutory notice. It is also instructive to note that the law applicable to the exercise of the statutory power of sale herein is to be found in the Registered Land Act (now repealed) as the suit property charged was registered under the said Act. Therefore, section 69 of the Transfer of Property Act (now repealed) referred to in the 2nd Defendant's submissions does not apply. The Transfer of Property Act, 1882 was introduced and applied in Kenya as a substantive law by Article 11(b) of the East African Order in Council, 1897 in respect to parcels of land registered under the Registration of Titles Act.
34. Moving forward, the 3rd Defendant's witness, Mr. Joseph Matheka (DW 3) testified that before the sale, the Plaintiff was issued with a notice dated **13th June 1984**. It was his testimony that a notice had been posted to the Plaintiff's address. However, he did not produce a certificate of posting or any documentary evidence to show that the Statutory Notice was indeed served on the Plaintiff. See: **Ochieng and Another vs Ochieng and Others, Civil Appeal No. 148 of 1995 EALR[1995-98] at pg 260**. In the circumstances it is plain that the Plaintiff was not served in terms of section 153 of the Registered Land Act (Cap. 300).
35. 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 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.
36. 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 powers to give it any legal life.
37. With regard to the notification of sale and the redemption notice required to be served by the auctioneer, it is apparent that the Auctioneer rules that the Plaintiff seeks to rely on came into force in 1997 after the auction herein was conducted. The rules therein cannot apply retrospectively. Therefore, I will not say more.

38. It is unfortunate that this suit is being determined almost 20 years after its inception. It is clear that much has changed with regard to the suit property in terms of development and its value. I understand that the 2nd Defendant has been in possession of the suit property since 1994 and has undertaken various developments on the same. In that case the remedy of the 2nd Defendant against the 3rd Defendant Bank will be to obtain a refund of the price paid for the suit property as well as the value of the developments made therein. However, those issues are not before this Court as the 2nd Defendant did not make any claims against the Bank in these proceedings.

39. Consequently, I allow the Plaintiff's claim in terms of prayer (b) and make orders as follows:

- a. *That the sale of L.R Number KIGANJO/KIAMWANGI/208 by the 1st and 3rd Defendants to the 2nd Defendant and the transfer together with the title deed issued pursuant thereto was illegal and a nullity in law and the same is herewith cancelled.*
- b. *The original Charge in respect of the suit property in favour of the 3rd Defendant by the Plaintiff is hereby restored.*
- c. *That the Plaintiff has the option to redeem the said property in terms of the said Charge.*
- d. *The Plaintiff's costs for this suit shall be paid by the 3rd Defendant. The rest of the parties to bear their own costs.*

DATED, READ AND DELIVERED AT NAIROBI

THIS 23RD DAY OF JANUARY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Thuku for Applicant

Muriithi for 2nd Defendant

Teresia – Court Clerk