



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 102 OF 1997

JOSEPH KINGSLEY KARURI MAINA.....PLAINTIFF

VERSUS

HOUSING FINANCE

COMPANY OF KENYA LTD.....1ST DEFENDANT

GETRUDE KAMANTHE MUNGUTI.....2ND DEFENDANT

JUDGMENT

Joseph Kingsley Karuri Maina, hereinafter referred to as the Plaintiff, filed an action by way of the Further Amended Plaint dated 17th May, 2001 against **Housing Finance Company of Kenya Ltd** and **Getrude Kamanthe Munguti**, hereinafter referred to as the 1st and 2nd Defendants, whereof he sought for judgment in the following terms:

- a) Declaration that any sale of land parcel title no.Aguthi/Gatitu/1828 by the 1st Defendnat through their agents contrary to the provisions of the Registered Land Act is null and void.
- aa) Rectification of register pursuant to Section 143 of the Registered Land Act, Cap 300.
- b) An order that the Plaintiff be permitted by the 1st Defendant to re-pay the amount of the charge with interest thereon at proper rates of re-payment.
- c) An order restraining the Defendants from selling the suit property without following the provisions of the law;
- cc) A declaration that the sale of land parcel Aguthi/Gatitu/1828 by the first defendnat to the third defendant on 6th February, 2001, is null and void
- d) Costs of the suit with interest at court rates.

The Defendants denied the Plaintiff's claim by each filing a defence.

When the suit came up for hearing the Plaintiff testified without summoning an independent witness. The defence summoned two witnesses to testify in support of their case. At the close of the evidence parties were allowed to file and exchange submissions. I have considered the evidence and the rival submissions. In his evidence in chief, the Plaintiff (P.W.1) told this court that in 1988 he pledged L.R.no.Aguthi/Gatitu/1828 to the 1st Defendant as a collateral to secure a loan facility of Kshs.300,000.

P.W.1 stated that he executed the charge document by appending his signature which was registered over L.R.no. Aguthi/Gatitu/1828 in favour of the 1st Defendant on 12th June 1988. The Plaintiff alleged that Mt. Kenya Bottlers his former employers failed to remit his monthly payments to the 1st Defendant but unfortunately he did not produce any payslips in evidence as exhibits. P.W.1 produced the charge document he personally executed in favour of the 1st Defendant as an exhibit in evidence. A critical look at the charge i.e PEXH.3 will reveal that there were only two contracting parties namely Joseph Kingsley Karuri Maina (Plaintiff) and Housing Finance Company of Kenya Ltd (Defendant). The Plaintiff however, claimed that there was a tripartite agreement. That piece of evidence is not supported by the evidence P.W.1 tendered when he testified. Mr. Mugambi, learned advocate for the 1st Defendant cross-examined the Plaintiff who in turn admitted that the charge document stated in clauses 5 and 6 that interest on outstanding debt due for repayment would be charged. He even admitted that in the early 1990 when his loan account fell into arrears, the bank notified him forcing him to renegotiate for the rescheduling of the debt repayment to enable him comfortably honour repayments of the loan. In response to Plaintiff's assertions the 1st Defendant D.W.1 confirmed the existence of a valid charge registered against the Plaintiff's L.R.no. Aguthi/Gatitu/1828. D.W.1 however, denied the Plaintiff's claim that he faithfully serviced his loan. The 1st Defendant also denied the averment by the Plaintiff that the repayment proposals he made after he was served with a statutory notice constituted a waiver of the Statutory Notice issued in 1991. The 1st Defendant also denied the Plaintiff's averment about the sale of the collateral at an undervalue. The 1st Defendant told this court that this suit is overtaken by events as sale to the 2nd defendant had already taken place and a registration and issuance of the title to the 2nd Defendant had already been done by the date the suit was being filed and any orders being issued. The 2nd Defendant (D.W.2) on her part confirmed having purchased the suit property from the 1st defendant in a public auction in 1997. D.W.2 stated she had sent one Justin Nzaneke to bid on her behalf. D.W.2 said her agent bid and was the second highest bidder at Kshs.804,000 while the highest bidder was Kshs.805,000. D.W.2 paid Kshs.201,000 being 25% of the purchase price as the initial deposit and remaining balance was financed by a loan from the 1st Defendant after which the property was transferred to her since then the 2nd Defendant said she has never taken up possession. D.W.2 said she was later served with pleadings and orders relating to this case. She denied committing any fraud. She confirmed in her evidence in cross-examination that at the time of obtaining title the Plaintiff had not obtained a court order to stop the public auction.

Having set out the evidence in brief I now propose to determine this case according to the issues identified, agreed upon by the parties and filed on 22nd January 1998. **First:** Whether or not the Plaintiff repaid the loan up to 1992 as per the terms of the charge agreement? I have already analyzed in brief the evidence tendered by each party to this case. The Plaintiff in his evidence introduced Mt. Kenya Bottlers as a third party to the charge agreement. He categorically stated that his failure to service the loan was because his employer, Mt. Kenya Bottlers had failed to remit the agreed monthly installments to be deducted from his salary. The Plaintiff did not produce his payslips in evidence when he testified. Looking at the charge document Mt. Kenya Bottlers does not feature anywhere hence it was not privy to the contract between the 1st Defendant and the Plaintiff. The answer to the above question therefore is that the Plaintiff had failed to service his loan thus breaching the terms of the loan agreement. The Plaintiff readily admits that he renegotiated with the 1st Defendant to re-schedule repayment when he started falling into arrears in the year 1990. According to the evidence of D.W.1, the Plaintiff failed to honour his scheduled loan repayments and the 1st defendant was eventually forced to issue a statutory notice dated 13th August, 1991 under **Section 74** of the **Registered Land Act** through the law firm of Gichuru Mathenge & Co. Advocates. The Plaintiff did not specifically deny having been served with the statutory notice by the 1st Defendant. In fact, in paragraph 5 of the Further Amended Plaintiff he admits having been served with a demand and a notice of intention to sell by the 1st Defendant in 1991. The Plaintiff is bound by his pleadings and he cannot now turn around and deny service.

The second issue left to this court to determine is whether or not the rescheduling of the loan repayment amounted to a waiver of the demand to repay or the notice of the statutory power of sale? It is trite law that the statutory power of sale by the 1st defendant arises once the plaintiff fall into arrears and further fails to pay the debt. When such a scenario manifests itself, the 1st Defendant is enjoined by **Section 74(1)** of the **Registered Land Act** to issue a statutory notice of sale. The Plaintiff states that he approached the 1st Defendant to reschedule the repayment of the loan to avoid he property being sold.

The 1st Defendant through the evidence of Migui Mungai (D.W.1) stated that the 1st Defendant postponed the right to exercise its statutory power of sale immediately when the Plaintiff pleaded with the 1st Defendant to re-schedule the loan repayment. The Plaintiff's act of pleading for the loan to be rescheduled amounts to an acknowledgment of his indebtedness. A critical reading of **Section 74** will reveal that the law did not impose upon the chargee any burden to re-issue a fresh statutory notice in 1997 before conducting the public auction. Courts cannot re-write contracts for the parties hence I do not intend to read into the law otherwise.

The third issue which came up for determination is whether or not the public auction was lawfully conducted?

It is the 1st Defendant's submission that the auction was conducted in accordance with the law. The Plaintiff's contention is that L.R.no.Aguthi/Gatitu/1828, the charged property was valued Kshs.4,000,000 and that the 1st Defendant failed to act in good faith and failed to take into account his interests as the chargor by selling the property at an under value of Ksh.800,000. For this reason, the Plaintiff averred that the 2nd Defendant acted fraudulently. The Plaintiff did not present to this court a valuation report to buttress his assertion that the market value of the charged property was worth Kshs.4,000,000 at the time of the auction. The charge being the agreement between the Plaintiff and the 1st Defendant, gave power to the 1st Defendant to invoke its statutory power of sale under **Section 74** of the **Registered Land Act** if the Plaintiff defaulted to repay the loans. Under **Section 109** of the **Evidence Act**, the law clearly placed the burden of proof of a fact alleged to exist on the person who makes the allegation unless the law expressly placed that burden on someone else. The Plaintiff did not discharge that burden in this respect to establish that there was any commission of fraud in the manner the public auction was conducted.

Fourthly, this court was also challenged to determine the question as to whether or not the 2nd Defendant committed acts of fraud and whether she acquired a proper title to the suit property?

There is no dispute that L.R.no.Aguthi/Gatitu/1828 was sold by public auction to the 2nd Defendant on 15th April 1997 as evidenced by the certificate of official search and the title deed produced by the 2nd Defendant. I have considered the rival submissions and I think I should not belabour on the point for so long because the issue was long settled by the decisions of this court and those of the court of appeal. It is trite law that once a statutory power of sale has been exercised the mere irregularity in the exercise of that power does not in itself amount to an invalidation of a sale. The remedy of an aggrieved party is a claim for damages. Nothing therefore, turns out on the Plaintiff's contention that the sale was irregular.

The final issue to determine is whether register of title to the suit land should be rectified and whether or not the Plaintiff is entitled to the reliefs sought.

The evidence tendered by the 2nd Defendant shows that at the conclusion of the sale by public auction, conducted on 15th April 1997 she executed an agreement for the purchase of L.R.no.Aguthi/Gatitu/1828, the same was transferred to her and title issued on 14th May 1997. The Plaintiff's equity of redemption was extinguished once the property was registered in the name of the 2nd Defendant. The Plaintiff registered a court order on 23rd June 1997 long after title had changed hands from him to the 2nd Defendant in a forced sale. The order obtained by the Plaintiff merely stopped further dealings with the suit property but did not stop the sale of the property.

In the end, and for the above reasons I see no merit in the Plaintiff's suit. The same is dismissed with costs to the Defendants. The orders of injunction registered against the title must be vacated immediately.

Dated, Signed and delivered in open court this 21st day of February, 2014.

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J.K.SERGON

JUDGE

-In the presence of:

The Plaintiff in person

Mr. Kiboi for the 1st Defendant

N/A for Mr. Mbahika for 2nd Defendant but with Notice