



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 783 OF 2017

CHRISTOPHER MWENDIAH OMWANDO.....PLAINTIFF

-VERSUS-

KENYA INDUSTRIAL ESTATES LIMITED.....1ST DEFENDANT

GEORGE MAINA.....2ND DEFENDANT

LAND REGISTRAR KAJIADO.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

The Plaintiff's claim against the Defendants is as follows;

(i) A declaration that the purported sale by Auction of all that parcel of land known as KAJIADO/KISAJU/2664 situated in Kajiado, by the first and second Defendants and the threatened transfer of the Plaintiff's land to the second Defendant is fraudulent wrongful and unlawful.

(ii) The Honourable Court do proceed to revoke the title fraudulently transferred and registered in the names of second Defendant herein being Kajiado/Kisaju 2664.

(iii) That the Honourable Court do proceed to compel the 3rd Defendant herein to register the said property in the Plaintiff's name.

(iv) The Defendants be compelled to pay damages.

This is as per the amended plaint dated 2nd November, 2018.

The Plaintiff's case is as follows.

He was the registered proprietor of the suit land. On 24/1/2004, he charged the suit land with the first Defendant. He obtained a loan of Kshs. 500,000/= which was payable at a monthly instalment of Kshs. 20,000/=. The Plaintiff paid the monthly instalments as agreed but the first Defendant refused to give the Plaintiff a copy of loan payment statement. This was without lawful justification.

The Plaintiff fell sick and travelled to India to seek treatment. On coming back to the country, he visited the first Defendant's offices and on making enquiry, he learned that suit land had been sold by auction to the second Defendant.

By the time the Plaintiff's land was sold, he had already repaid the loan and more and the suit land was valued at Kshs. 4.5 million. The land was sold when the Plaintiff was willing to pay the principal sum which the first Defendant refused to accept.

The purported sale of the Plaintiff's land was bad for the following particulars of fraud;

(i) The land was worth Ksh. 3.5 million yet it was sold for Kshs. 900,000/=.

(ii) Statutory Notice required by the law was not issued.

(iii) Failure to notify the Plaintiff sufficiently.

- (iv) Refunding Kshs. 900,000/= to George Kibegwa during the auction yet he was ready to buy the land.*
- (v) Accepting Ksh. 900,000/= as forced sale and failing to transfer the land to the person who paid this amount.*
- (vi) Purporting to have sold the suit land through an auction which never took place.*
- (vii) Failing to update the Plaintiff's statement of account after payments were made.*
- (viii) Forging documents to purport that the sale by auction took place when this was not the case.*
- (ix) Purporting to exercise power of sale without any lawful notice of sale.*
- (x) Failing to give any or any due accounts of payments in settlement of the suit loan.*
- (xi) Colluding to transfer the suit property in the name of the second Defendant.*

Aggrieved as above, the Plaintiff filed this suit on 16th October, 2012 and later amended the plaint on 2nd day of November, 2018.

In support of his case, the Plaintiff filed the following documents;

- 1. Copy of Title Deed dated 25/2/2003.*
- 2. Copy of charge dated 24/2/2004.*
- 3. 8 copies of deposit slips dated 6/3/2006, 30/7/2004, 8/6/2004, 17/8/2004, 17/9/2004, 13/1/2004, 26/2/2004 and 26/2/2004 showing a total deposit of Kshs. 154, 000/-.*
- 4. Caution dated 3rd October against the suit land.*
- 5. Correspondence on payments.*
- 6. Minutes on loan negotiation while the Plaintiff was in default.*
- 7. Copy of official search dated 13th March, 2013.*
- 8. Copy of Plaintiff's passport .*
- 9. Medical reports.*
- 10. Copy of cheque dated 8/10/2012 for Kshs. 277,132 drawn by the Plaintiff in favour of the first Defendant.*
- 11. Copy of Notice of Sale dated 24/3/2006 issued by Sanjomu Auctioneers concerning the sale of the suit land.*
- 12. Copy of receipt no. 168453 and copy of receipt no. 168452 dated April 2006 for Kshs. 134,000/= paid by George Kibegwa to the first Defendant.*
- 13. Demand letter by J.O. Barongo advocates dated 5/9/2006.*
- 14. Evidence of deposit of Kshs. 134,000/= into a bank account.*

In its amended statement of defence, the first Defendant denied the Plaintiff's averments in the Plaintiff.

The defence dated 22/11/2018 is to the effect that the Plaintiff was advanced a loan of Ksh. 500,000/- after charging the suit land. The Plaintiff paid for a few months and then defaulted. All the while, the plaintiff was furnished with the statement of account. This culminated in a meeting between the Plaintiff and the first Defendant where the Plaintiff failed to pay the loan as advised.

When it became inevitable to auction the property due to the Plaintiff's persistence in breach, the Plaintiff colluded with some alleged buyers. The said buyers paid Kshs. 100,000/= and Kshs. 130,000/= respectively. All this was intended to assist the Plaintiff evade his lawful obligation of paying the loan advanced to him. The first Defendant moved with speed and thwarted the ill motivated sale which was detrimental to the first defendant.

It is the first Defendant defence that the requisite statutory notices were issued and served on the Plaintiff. The plaintiff made several attempts to reverse a sale that had lawfully taken place and when his equity of redemption had been extinguished.

The first Defendant concluded by saying that no notice of intention to sale was ever served upon it and the Plaintiff's suit which is perjurious,

incompetent, defective, fictitious, misdirected, unavailable and an abuse of the Court process and should be dismissed.

The second Defendant in a statement of defence dated 9th November, 2018 denies any privity of contract with the Plaintiff and states that he lawfully acquired the land after paying the requisite consideration. He concludes by saying that the Plaintiff's suit has been overtaken by events and should be dismissed with costs.

The third and fourth Defendants in a statement of defence dated 17th December, 2018 deny the Plaintiff's claim in its entirety and add that no notice of intention to sue was served upon them.

The first Defendant filed the following in support of its defence;

- (1) Witness statement by Francis Kabuga dated 11/9/2020.*
- (2) Copy of Title Deed dated 25/2/2003.*
- (3) Copy of charge dated 24/2/2004.*
- (4) Copy of Official Search dated 26/2/2004.*
- (5) Copy of Loan Agreement dated 9/3/2004.*
- (6) Copy of Deed of Guarantee dated 9/3/2004.*
- (7) Copy of Statutory Notice issued to the Plaintiff dated 27/10/2009 notifying him of default and warning him of sale by auction.*
- (8) Plaintiff's statement of Account as at 12/7/2012 showing a balance of Kshs. 543, 059.69 which was outstanding.*
- (9) Copy of valuation for the suit land dated 5/3/2012 showing the market value, value for mortgage purposes and forced sale value.*
- (10) A Sketch Map showing the location of the suit land.*
- (11) A Mutation Form dated 15/10/2002.*
- (12) Two photographs*
- (13) Certificate of Official Search dated 28/2/2012.*
- (14) Public Auction Notice in the Daily Nation of May 14, 2012 advertising the suit land for sale.*
- (15) Certificate of Service dated 4th April 2012.*
- (16) Notification of Sale dated 29th March, 2012.*
- (17) Certificate of Sale dated 6/6/2012.*

The second Defendant filed 15 documents most of which are similar to those of the first Defendant. The ones that are extra include

- (1) Agreement for sale of suit land dated 6/6/2012*
- (2) Transfer of chargee in exercise of power of sale dated 17th October, 2012.*
- (3) Application for consent of the Land Control Board dated 4/9/2012.*
- (4) Letter of consent dated 10/10/2012.*
- (5) Valuation Requisition for Stamp Duty dated 10/7/2012.*
- (6) Acknowledgement of securities dated 16/7/2012 and*
- (7) Bankers Cheque for Kshs. 900,000/- dated 15/6/2012 in favour of the first Defendant.*

Counsel for the parties filed written submissions, on 29/6/2021, 25/11/2021, 1/12/2021 and 6/12/2021 respectively.

The Plaintiff raised the following issues.

Firstly, he raised the issue of failure by the first Defendant to serve the Plaintiff with a statutory notice prior to selling the suit property by auction.

Secondly, the Plaintiff said that the auctioneer never submitted the list of bidders in the Auction as proof that it was indeed a Public Auction. Again, payment of the consideration by the second Defendant was made after the issue of the Certificate of Sale.

Thirdly, the Plaintiff urges that there is a big difference in value of the suit land in the two valuation reports by the Plaintiff's valuer with one having a forced sale value of Kshs. 800,000/= and the other Kshs. 2, 400,000/=.

Fourthly, counsel for the Plaintiff raised the issue of valuation for stamp duty being Ksh. 3.5.million which differs with the other two valuations.

Finally, counsel concludes by saying that the second Defendant was issued with the Title Deed to the suit land when this suit was pending in Court and this is not proper.

Counsel for the Defendants substantially responded to the five issues above.

I have carefully considered all the evidence adduced by all the parties, the submission by their learned Counsel as well as the jurisprudence contained in the submissions.

Since it is not disputed that the Plaintiff obtained a loan of Kshs. 500,000/=from the first Defendant and charged the suit land to obtain the loan, I find that the issues in dispute are only two (2) because it is also not disputed that the Plaintiff defaulted in the loan payment.

The issues that arise are;

(1) Whether fraud has been proved by the Plaintiff or the part of the Defendants?

(2) Whether the sale of the suit land by the first Defendant to the second Defendant was proper?

On the first issue, I find that the fraud has not been proved at all. The burden of proving fraud lay on the Plaintiff. Such burden is not the normal one in Civil cases where the Plaintiff proves on a margin of probabilities.

The burden on the Plaintiff was heavier though not as heavy as in criminal cases where it is beyond reasonable doubt.

The authority of *Peter Kamau Ikigu –vs- Barclays Bank of Kenya and Peterson Ogino Ongaro HCCC No. 719 of 2003* cited by the first Defendant's Counsel is good law for the above proposition.

The Plaintiff pleaded eleven particulars of fraud. He did not prove any of them. He did not prove that the value of the land was Ksh. 3.5. Million. He did not prove that he was not sufficiently notified of the default because he knew about it himself. He did not prove that the value of the land was not Kshs. 900,000/-

Worse still, the Plaintiff did not prove that he was up to date in payment of the monthly instalments.

In fact, the Plaintiff's own documents like the minutes of the loan negotiations proves good faith on the part of the first Defendant. When the Plaintiff was sick, the first Defendant gave him a second chance to pay the outstanding loan balance and he failed to do so.

On the second issue, I find that the sale of the suit land by the first Defendant to the second Defendant was proper for the following reasons.

Firstly, the sale did not take place until the Plaintiff had defaulted in payment of the monthly instalments.

Secondly, the first defendant has exhibited the notices that were issued prior to the auction including the advertisement in the Daily Nation of May 14, 2012.

The first Defendant has shown that the auction had all the ingredients of a public auction while the Plaintiff has failed to prove otherwise.

Finally, the Plaintiff has not proved that he obtained any injunctive orders to stop any of the processes that the Defendants undertook in order to realize the money that the plaintiff owned the first Defendant.

For the above stated reasons, I dismiss the Plaintiff's suit with costs to the defendants.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 22ND DAY OF MARCH, 2022.

M.N. GICHERU

JUDGE