



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 259 of 2004**

**JOSEPH M. MBUVA.....PLAINTIFF**  
**VERSUS**

**PIONEER BUILDING SOCIETY LIMITED..... 1<sup>ST</sup> DEFENDANT**

**(IN RECEIVERSHIP)**

**PETER KARANJA NGURE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff filed suit by his plaint dated 18/3/04 and filed on the same date in which he prayed for judgment to be entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant jointly and severally for:

- a) A permanent injunction restraining the Defendants from any way whatsoever interfering with L.R. NO. 2787/50/XII (hereinafter referred to as the “Suit Property”) and complying with the sale to the Plaintiff.
- b) Revocation of the illegal transfer to the 2<sup>nd</sup> defendant and a declaration of the Plaintiff as the legitimate purchaser of the Suit Property
- c) Costs.

**FACTS**

The Plaintiff, a farmer based in Nanyuki town sought to purchase the Suit Property from Leonard Muriungi M’Ambutu in 1989 and the two actually entered into a Transfer dated 20<sup>th</sup> July 1989. The Suit Property was being sold for Ksh. 300,000/-. The Transfer to the Plaintiff was not immediately registered because the Suit Property was charged to the 1<sup>st</sup> Defendant which was under receivership. Thereafter, the Plaintiff travelled to Nairobi and held a meeting with Ann Kaiga, the Official Receiver of the 1<sup>st</sup> Defendant, whereupon he expressed his interest in the Suit Property. The Plaintiff kept in touch with the Official Receiver of the 1<sup>st</sup> Defendant and learnt that Mr. M’Ambutu did not pay any money to the Official Receiver. The Plaintiff took possession of the Suit Property soon after he paid the deposit of Ksh. 150,000/-. By her letter dated 15/4/03. The Official Receiver rejected the Plaintiff’s offer of Ksh. 450,000/- for the Suit Property and instead requested for Ksh. 650,000/-. The Plaintiff was unable to raise that amount. Around March 2004, an auction of the Suit Property was advertised by Libco Merchants to take place on 21/3/04. Upon learning of the same, the Plaintiff rushed to court and filed CMCC. No. 2678 of 2003. In the same suit, he filed an application for injunction stopping the

scheduled auction pending the hearing and determination of the Suit. He got ex-parte orders on 20/3/03.

However, the said orders were discharged on 3/4/03 as the Plaintiff failed to prosecute the application. It is also worth noting that the Plaintiff did not register the order of 20/3/03 against the title of the Suit Property. Thereafter, the 1<sup>st</sup> Defendant filed an application to strike out the Plaintiff's Suit CMCC No. 2678 of 2003 and the same was struck out on 10/9/03.

In the meantime, since there was no order prohibiting the sale, the 1<sup>st</sup> Defendant proceeded to re-advertise the Suit Property for sale. The same was advertised on 28/4/03 and the public auction was scheduled for 9/5/03. On the scheduled date, the public auction took place and the 2<sup>nd</sup> Defendant was declared the highest bidder at a sum of Ksh. 617,000/-. The terms of sale was that the highest bidder was required to pay 25% of the amount at the fall of the hammer. The 2<sup>nd</sup> Defendant paid Ksh. 300,000/- vide Bankers Cheque No. 620745 and was issued with receipt No. 761 which was produced as D. Exhibit 5. Subsequently, the 2<sup>nd</sup> Defendant paid Ksh. 150,000/- on 4/6/03 and Ksh. 167,000/- on 30/7/03 directly to the Official Receiver. After full payment of the full purchase price, a Transfer (D. Exhibit 14) in favour of the 2<sup>nd</sup> Defendant was prepared and registered against the Title of the Suit Property. After the filing of this suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants discovered an error in the Transfer (D. Exhibit 14) that the date of the public auction read 21/3/03 instead of 9/5/03. This necessitated the preparation and registration of a Deed of Rectification. The same was done and the said Deed registered against the Title of the Suit Property.

In the Plaintiff, the Plaintiff asserted that the sale of the Suit Property was shrouded by fraud and listed the following particulars of fraud:

- a) fraudulently selling the Suit property through a private agreement knowing too well of the Plaintiff's interests.
- b) failing to sell the property by Public Auction
- c) fraudulently selling the property at a price far below its expected value
- d) 2<sup>nd</sup> Defendant purchasing the property yet he has always had knowledge of the Plaintiff's interest on the land parcel.
- e) 1<sup>st</sup> Defendant fraudulently breached their chargees duty of care
- f) fraudulently selling the land parcel to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant and yet on the other side the 1<sup>st</sup> Defendant assures the plaintiff of the protection of his interests.
- g) 1<sup>st</sup> Defendant fraudulently attempting to extort from the Plaintiff yet he knows very well that he had already secretly sold the land parcel
- h) The 1<sup>st</sup> and 2<sup>nd</sup> Defendant transferring the land parcel yet a court order restraining the same was in effect.

In brief, the Plaintiff asserts that the sale of the Suit Property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was improper for the reason that it was fraudulently achieved. He asserts that the Plaintiff had an interest in the Suit Property which interest was overlooked by the 1<sup>st</sup> Defendant. It is to be noted that the Plaintiff has been in actual possession of the Suit Property from when he paid the deposit of Ksh. 150,000 to Mr. Leonard M'Ambutu to date. By this reason, the Plaintiff asserts that the 2<sup>nd</sup> Defendant knew of the Plaintiff's interest in the Suit Property by the time the 2<sup>nd</sup> Defendant bought the Suit Property and that the 2<sup>nd</sup> Defendant cannot claim to be an innocent purchaser for value without notice. The Plaintiff further asserts that it was wrong for the 1<sup>st</sup> Defendant to proceed with the sale by public auction when all along

he was aware that the Plaintiff was interested in the Suit Property and there were ongoing dealings between the Plaintiff and the 1<sup>st</sup> Defendant for the purchase of the Suit Property by private treaty. It is from this factual background that the Plaintiff asserts that the sale of the Suit Property from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was not proper and should be set aside and the Suit Property sold to the Plaintiff.

## LAW

Section 26(1) of the Land Registration Act provides as follows:-

***“The Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon a transfer... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –***

***(a) On the ground of fraud or misrepresentation to which the person is proved to be a party, or,***

***(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”***

While the Defendants produced a copy of the Certificate of Title bearing the name of the 2<sup>nd</sup> Defendant as the registered proprietor of the Suit Property to the Court, the Plaintiff alleges this Title is not valid owing to its having been tainted with fraud. Has the Plaintiff established that the Defendants were guilty of fraud? To answer this question, we must shift focus to the actions of the 1<sup>st</sup> Defendant which was the legal owner of the Suit Property by virtue of the charge registered in its favour over the Suit Property. It is not disputed that Mr. Leonard M’Ambutu, who charged the Suit Property in favour of the 1<sup>st</sup> Defendant, was in default giving rise to the 1<sup>st</sup> Defendant seeking to exercise its statutory power of sale.

Section 98 (1) of the Land Act provides as follows:-

***“if a Chargee or receiver becomes entitled to exercise the power of sale, that sale may be***

***(d) by private contract at market value***

***(e) by public auction with reserve price”***

Clearly, the 1<sup>st</sup> Defendant was entitled to dispose off the Suit Property by means of private contract or by public auction. The claim by the Plaintiff that the 1<sup>st</sup> Defendant was guilty of fraud because it did not sell the Suit Property by public auction or private contracts is therefore baseless. The 1<sup>st</sup> Defendant was entitled to sell the Suit Property by either means. Further, it has been proved that the Suit Property was going to be sold to the Plaintiff by the 1<sup>st</sup> Defendant at a purchase price of Ksh. 650,000/- but the Plaintiff was unable to raise this amount, but instead offered Ksh. 450,000/-. This offer was rejected by the 1<sup>st</sup> Defendant paving way to the sale by public auction to the 2<sup>nd</sup> Defendant. No fraud has been proved in this action of the 1<sup>st</sup> Defendant. Further, the Plaintiff not being the Chargor in this case was not entitled to assert that the Suit Property was not sold at its expected market value or that the 1<sup>st</sup> Defendant breached their chargees duty of care. Further no evidence of fraud was provided in that respect. There is no evidence that the 1<sup>st</sup> Defendant sought to extort money out of the Plaintiff. Their dealings were purely based on a willing buyer willing seller basis where the 1<sup>st</sup> Defendant rejected the offer of Ksh. 450,000/- by the Plaintiff and requested for Ksh.650, 000/- for the Suit Property. It has also been proved to the satisfaction of this court that the public auction conducted on 9/5/03 was not done in contravention of any court order.

On the part of the 2<sup>nd</sup> Defendant, all particulars of fraud listed in the Plaint against him remain

unsubstantiated. Though it is possible that the 2<sup>nd</sup> Defendant may have known the Plaintiff and the Plaintiff's occupation and claim on the Suit Property, the Plaintiff has not proved that it is entitled to any protection whatsoever by this court. The Suit Property remained legally owned by the 1<sup>st</sup> Defendant, not Mr. Leonard M' Ambutu or the Plaintiff who remained in occupation of the Suit Property solely by means of an injunction.

An injunction does not confer Title to Land. The injunction remain a means of conserving the Suit Property until this Court arrives at a final determination of this Suit. The legal owner of the Suit Property remained the 1<sup>st</sup> Defendant at all material times until the sale by public auction to the 2<sup>nd</sup> Defendant. Even the Plaintiff acknowledges this as he travelled to Nairobi to negotiate with the 1<sup>st</sup> Defendant to sell the Suit Property to him by private treaty. These negotiations fell through. However, the sale by public auction on 9/5/03 to the 2<sup>nd</sup> Defendant was properly concluded and the Suit Property legally transferred to the 2<sup>nd</sup> Defendant. This court therefore finds that the two Defendants are not guilty of any fraud as alleged by the Plaintiff. Following from that conclusion, this court is duty bound to uphold the Certificate of Title issued to the 2<sup>nd</sup> Defendant in compliance with the law.

### CONCLUSION

In the light of the foregoing, this Court dismisses the suit with costs to the Defendants.

**SIGNED AND DELIVERED AT NAIROBI ON THE 17<sup>TH</sup> DAY OF MAY 2013.**

**MARY M. GITUMBI**

**JUDGE**