

court on 2nd August 2011 claiming, *inter-a-alia*:-

- a) An order that the balance of Kshs.3,395,662.80 be paid to the Plaintiff.
- b) An order for general damages against the Defendant for the illegal eviction from the suit properties L.R. No. 209/10481/85.
- c) Mesne profits of Kshs.15,000/= per month with effect from 21st August 2009 till (a) above is paid in full.
- d) Costs of this suit.
- e) Various interests.
- f)
- g) Any other reliefs.

The Plaintiff's suit is based on the paragraphs 3 and 4 of the Plaint and to the effect that by a charge dated 16th October 1989 made between the Defendant and the Plaintiff, the Plaintiff charged his premises above being security for repayment of Kshs.650,000/= lent and advanced to the Plaintiff with interests as may be increased or reduced from time to time. The Plaintiff alleges that upon his default the Defendant in exercise of its statutory power of sale as provided under the Indian Transfer of Property Act (ITPA), sold the charged properties on 8th November 1996 for a sum of Kshs.4.5 million, and received and banked the mandatory 25% deposit of Kshs.1,125,000/= which cleared all the incidental costs and charges leaving a credit of Kshs.20,662.80 in favour of the Plaintiff. This credit, together with the 75% balance of Kshs.3,375,000/= hence a total of Kshs.3,375,000/= plus interests as aforesaid is what the Plaintiff claims now.

The Defendant filed its defence on 14th October 2011 in which it denies the Plaintiff's allegations. The Defendant agrees that the said auction took place as alleged and the proposed purchaser paid the 25% deposit being Kshs.1,125,000/= but that the purchaser defaulted and never paid the balance of 75%. A second attempt to stage an auction was stopped by the Plaintiff through an injunction in HCCC No. 660 of 1987 which suit was later dismissed. The Defendant further alleges that in February 2009 the suit property was sold by Private treaty to John Wambua Kiilu for a sum of Kshs.4.5 million which was used to clear part of the outstanding loan leaving a loan balance of Kshs.6,800,000/= outstanding with interest. The Defendant further alleges that the current suit is time barred and should be dismissed; and that this suit is *Res Judicata*.

At the hearing the Plaintiff was his sole witness. He testified in support of the allegations contained in the Plaint. The Plaintiff testified that he brought the suit property L.R. No. 209/10481/85 from Trans Asia Trading Company in 1989 for Kshs.850,000/=. There was a foundation on the property which he build. On 16th October 1989, he charged the property to the Defendant for Kshs.650,000/=. He defaulted in the repayment and the Defendant sold the property on 8th November 1996 at an auction for Kshs.4.5 million and a deposit of Kshs.1,125,000/= was paid being 25% of the purchase price. At the time of the said sale the Plaintiff owed the bank Kshs.1,006,434.45. At page 48 of his bundle of documents the Plaintiff demonstrated how the Defendant applied the said deposit as follows:

- a) On the loan debt Kshs.1,006,434.45.
- b) Auctioneers cheques Kshs.65,002.75.
- c) Legal/Professional fees Kshs.32,900.00.
- d) Balance credited to the Plaintiff loan and as credit balance Kshs.20,662.80 as at 31st December 1996.

The Plaintiff testified that he was later asked to vacate the premises within 28 days after the said sale. The Plaintiff then secured a house near Ngong Road for Kshs.2.5 million and offered to exchange the new house for the old but the Defendant declined the proposal. The Plaintiff sought to get the balance of the said Kshs.20,662.80 but the Defendant refused to give the same. There was a subsequent lull in the activities until May 1992 when the Defendant re-advertised the said property for sale. By consent of the parties the sale was stopped. The Plaintiff finally lost the case when the court found that the Plaintiff had lost his right to redeem the property. The Plaintiff appealed against the said Ruling the decision of which partly gives rise to these proceedings when the court upheld that the Plaintiff had lost his right of redemption of his property at the fall of the hammer with another Judge urging the Plaintiff's right to accounts. It is important at this juncture to clarify that the court, when it stated that the Plaintiff had lost his right to redeem the property, was referring to the auction held on 8th November 1996, and not the subsequent sale by Private treaty which took place February 2009. The Plaintiff then testified to subsequent events leading to his eviction from the suit premises and losses which he allegedly suffered pursuant thereto.

Cross-examined on his testimony the Plaintiff agreed that due to his default the Defendant was entitled to sell his property. He further testified that he was not aware that the auction of 8th November 1996 aborted. He testified that the residue of the sale was his as it was his property that was being sold.

The Defendants sole witness was one Migui Mungai who testified that he is an advocate by profession and a legal manager, litigation, of the Defendant Company and has worked for the Defendant for the last one year. He confirmed the loan of Kshs.650,000/= advanced to the Defendant in 1989; the default by the Plaintiff and the auction of 8th November 1996. This property was sold to the highest bidder United Millers Limited for Kshs.4.5 million who paid the deposit of 25% being Kshs.1,125,000/=. The sale later aborted as the Purchaser failed to pay the balance of the Purchase price within the limited period. The Plaintiff was aware that the sale did not go through. D.W. 1 testified that there is no residue balance due to the Plaintiff arising from the said sale. He further testified that the 25% deposit of Kshs.1,125,000/= was transferred to the Defendant's profit and loss account, and that when a sale aborts any sums received goes to the Defendant and that the Plaintiff cannot benefit from a contract to which he is not a party and that the Plaintiff was still indebted to the Defendant. After the aborted sale the Bank on 18th January 2009 realized the security for Kshs.4.5 million which sum was credited to the mortgage account leaving a balance of Kshs.6,891,232/55. The Plaintiff never complained or raised an issue. On eviction the D.W. 1 testified that the Defendant never evicted the Plaintiff from the suit premises. He testified that one of the conditions of sale was that the deposit would be forfeited to the chargee.

The sum result of the evidence before the court from all the parties is that the main disagreement between the parties related to the 25% deposit sum of Kshs.1,125,000/= paid by United Millers Limited pursuant to the aborted auction sale of 8th November 1996. While the Plaintiff claims the sum as due to the mortgage account the Defendant submits that the same is for the Bank's loss and profit account. In fact, this is the only issue for this court to determine in this matter. But before that I will look at other prayers and periferrial issues raised in the suit.

The evidence adduced by both parties do not show that the Defendant, was in any way involved in the eviction of the Plaintiff from the suit property. The Defendant was not a party to the **CMCCC NO. 4964 OF 2009, JOHN WAMBUA KIILU – VS – CAPTAIN JAMES NYONGESA WAFUBWA** (the Plaintiff herein). No amount of legal imagination or insinuation can make the Defendant a party to the suit. That being so prayer (b) and (c) of the suit being prayers for general damages and *mesne* profits against the Defendant are not tenable and I dismiss the same. Consequently prayer (f) is also dismissed for the same reasons. This leaves me with only one substantive prayer which seeks that the residue balance of Kshs.3,395,662/80 be paid to the Plaintiff by the Defendant forthwith. The remaining prayers are for costs interests and relief which are consequential to prayer (a).

Before I proceed any further I must be clear what we are dealing with in relation to what other courts, including the Court of Appeal, has said, if at all, in relation to the matter at hand. In my view, and so as the defence of *Res Judicata* does not arise, the learned Judge Justice Njagi in Misc. 660 of 1997 (O.S.)

did not determine the issue of the residue of the balance or indeed the issue of accounts. The Judge restricted himself to the prayers in the suit which claimed a re-conveyance of the suit property to the Plaintiff. The Judge found this prayer untenable as the redemption right was extinguished upon the fall of the hammer at the auction sale. In fact, the learned Judge alluded to other possible remedies which may include the one under current consideration. The Judge said:-

“Whatever other remedies that the Plaintiff may be entitled to, such as a claim for damages, I do not think that he is entitled to the prayers he has sought. His action must therefore fail for the simple reason that he failed to redeem his property. The same was sold in the exercise of a statutory power of sale, and his right of redemption was extinguished upon the fall of the hammer at the auction sale. Therefore he is not entitled to a re-conveyance of the same. This case is dismissed with costs.”

All parties to the suit, and I too, agree with the learned Judge’s judgement that the Plaintiff’s right was extinguished upon the fall of the hammer at the auction sale. In fact, that is the reason the Plaintiff is not pursuing this line. The current issue is therefore not *Res Judicata* and has not been a subject of any suit between the parties.

Secondly, and still related to the above issue, when the current Plaintiff appealed the above decision to the Court of Appeal, all the three Judges, concurred that the Plaintiff’s right of redemption was extinguished at the fall of the hammer at the auction sale. The learned Justices Ole Keiwua, J.A. and Tunoi, J.A. completely concurred with each other on all the issues. However the learned Justice Nyamu, J.A. went further and brought two dimensions in his separate judgement. In his view, and he was right, considering the subsequent events, there was at that stage no final determination by the superior court on the issue of the rights of redemption and an order for accounts as between the two parties. At that stage the Defendant had argued that since the first auction had aborted, and the purchaser was still demanding back the deposit, the Plaintiff could not lay a right to the said deposit lest the Defendant would for some reason have to refund the same. On the second issue, the learned Judge Nyamu, J.A. directed the matter back to the superior court *“for the court to take accounts as between the two parties and to make such orders as it may deem fit whether or not the right of redemption had in the circumstances been extinguished bearing in mind that the appellant has also been in possession of the premises to date”*.

It is probable that the Plaintiff brought this present action for account pursuant to the observations by Justice Nyamu J.A. and also pursuant to a later Ruling by Lady Justice Mary Ang’awa on 11th July 2011.

In relation to the right of redemption I agree that the Plaintiff lost the same at the fall of the hammer on 8th November 1996. However, this fall of the hammer, apart from divesting the Plaintiff of his rights of redemption, did not transfer the property to the purchaser as the contract was not concluded. The Plaintiff’s right of redemption was subsequently revived, either in law or by waiver by the Defendant or by both the law, waiver and conduct of the Defendant. This is so because vide their letter dated 17th May 2004 the Defendant’s demanded payment of Kshs.11,166,428.6 from the Plaintiff and by their letter dated July 17th 2006 the Defendant threatened to sell the Plaintiff’s property at a reserve price of Kshs.2.5 million. The property was finally sold by Private treaty in February 2009 to John Wambua Kiilu for Kshs.4.5 million. This means that the Plaintiff actually lost his right of redemption at this second sale, and not at the auction, proving right the distinguished observations of the learned Judge Nyamu, J.A. in regard to time when the right of redemption was extinguished.

The above discourse is not relevant to the determination of the matter at hand, but is crucial so that it is clear that this court is not determining issues which may have been determined either by a court of concurrent jurisdiction or by the Court of Appeal.

Now I am back to the issue as to who, between the Plaintiff and the Defendant, is entitled to the 25% deposit paid by United Millers Limited on the aborted sale staged on 8th November 1996. It is clear that if the disputed sum belonged to the Plaintiff, then it was enough to clear outstanding mortgage balances and the auction expenses leaving a credit balance of over Kshs.20,662.80 in favour of the Plaintiff. In this suit

the Plaintiff is not concerned with the events leading to the sale by Private treaty. The Plaintiff's claim is limited to the auction purchase price on 8th November 1996. While the Plaintiff feigns ignorance of the aborted sale, it came into the light during the hearing of the matter, and I have accepted it as the truth, that the said auction indeed aborted and that is why it was subsequently possible to stage a successful auction in February 2009 and to transfer the property to John Wambua Kiilu. With this truth established the Plaintiff cannot lay claim to the 75% of the purchase price which was never paid. His claim, if at all, must be restricted to the 25% deposit paid which is Kshs.1,125,000/= and no more. So, the issue still is, whose money is this 25% deposit?

The Defendant alleges that the contract auction was between the Defendant and the Purchaser and that the Plaintiff being a third party to the said auction agreement, he cannot derive any benefit thereto. The Defendant submitted that in any event it would be required to refund the said amount to the Purchaser. However, I do not accept this argument since the auction took place in 1996 and there is no record availed to this court that the Purchaser wants back its deposit or that there is a suit by the Purchaser for the same. The Defendant submitted that by law and by practice any deposit paid under a sale by auction, where the sale aborts, is forfeited to the Defendant, and that indeed under the default clause of the memorandum of sale such deposit is to be forfeited to the chargee absolutely in the event that the purchaser fails to pay the balance of the purchase price. The Defendant further submitted that the deposit by the intending purchaser cannot be resorted to clear the Plaintiff's debt with the Defendant in an aborted sale. If this is the case, it would mean that the Plaintiff would have enjoyed the facilities and have the same settled by another person. The Defendant attempted to misled the court that the balance of Kshs.20,662.80 at page 58 of the Plaintiff's bundle was a negative balance. To the contrary, simple mathematic shows at close of statement of account on page 57, the Plaintiff owed the Defendant Kshs.1,006,434.45. After the deposit of 25% of Kshs.1,125,000/= was made there was a credit balance of Kshs.118,565.55. There were further debits of Kshs.65,002.75 and Kshs.32,900/= being charges for the auctioneer and legal fees leaving a credit balance of Kshs.20,662.80.

The Defendant submitted, without providing a basis for the same, that the Defendant was entitled to the said deposit. The Defendant referred to a default clause in the Memorandum of Sale as the basis of this claim. However, there is no such clause in the Memorandum of Sale at page 22 of the Plaintiff's bundle or on page 10 of the Defendant's bundle.

On his part the Plaintiff submitted that in exercising its power of sales under Clause 6 (ii) of the Mortgage document the Defendant was at all times acting on the authority donated to it by the Plaintiff pursuant to Clause 10 (j) under which the Plaintiff appointed the Defendant as its attorney for the purposes of executing the powers under the mortgage. The Plaintiff argued that the sale was for the mortgage property which entirely belonged to the Plaintiff and that the law and natural justice demanded that in the event of any surplus money the only beneficiary is the mortgage account.

In this regard I am better persuaded by the Plaintiff's submissions for three reasons.

The first reason is that this mortgage was entered into under the Indian Transfer of Property Act 1882. Clause 6 (ii) of the mortgage document is clear on that. That being so, what does the law provides:-

Section 69 (c) of the Indian Transfer of Property Act, on the application of proceeds of sale states as follows:

“The money which is received by a mortgagee, arising from a sale by him under the mortgagee's statutory power of sale after discharge of prior encumbrances to which the sale is not made subject, if any, or after payment into court of a sum to meet any prior encumbrances, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise, and secondly in discharge of the mortgage – money, interest, and costs, and other money, if any, due under the mortgage, and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.”

From the foregoing, it is clear to me the auction sale which took place on 8th November 1996 was a “sale” or an “attempted sale”. Whether or not it aborted it was either a sale or an attempted sale, and therefore the deposit received from it can only be spent as provided under the Act, and the balance thereof after deducting the costs and charges, must be used to reduce the mortgage debt and interest, with the residue, if any, given to the Plaintiff. If the proceeds of sale was applied as provided under above Section 69 (c) then clearly, the residue credit balance of Kshs.20,662.80 became the property of the Plaintiff and I hold that to be the position in my judgement.

Secondly, there is absolutely no grounds, whether based on morals of business, justice or society, upon which the Defendant, a bank, would be the person to benefit out of the deposit paid under a sale or an attempted sale. It is not the property of the bank that is being sold. Its involvement is as an attorney of the Plaintiff, even if it is exercising statutory power of sale. In fact, the bank has a duty to keep a very respectable distance from such money. The submission by the bank that it put the money to its profit and loss account is a mockery to the plight of the Plaintiff and is too insensitive to the justice of business.

My third reason is hypothetical, but is based on the legal principles of “finders keepers” and the “windfall”. By circumstances which were brought about by the aborted sale of the mortgaged property, a sum, which can rightfully be described as a windfall chances. Who should keep it?

In my view, this is a windfall which only the mortgage account can benefit from. The said account is already in arrears, and both the Plaintiff and the Defendants are interested in the healthy status of that account. If the deposit money could be described as a windfall, then the finder must keep it. The finder in my view is the originator of the action which is the mortgage account and the Plaintiff. Even if we were not sure who should keep the windfall, I am sure that the Defendant bank cannot logically and lawfully lay a claim to it.

From the foregoing I have no hesitation finding that the Plaintiff is entitled to the said credit balance of Kshs.20,662.80 immediately the deposit of 25% was made pursuant to the attempted sale on 8th November 1996. This being so, the Plaintiffs’ property ought not to have been sold by Private treaty in February 2009. That property was unlawfully sold, as at that time the Plaintiff did not owe the Defendant any money on account of the aforesaid mortgage transaction. The Plaintiff is therefore entitled to his property. However since the property was sold to a purchaser for value without notice of the preceding events, and since title has passed to the said purchaser upon the transfer registered on 21st April 2009, the Plaintiff is only entitled to the value of his property as at the time of the transfer to the Purchaser together with the expected appreciation in value since.

The suit/mortgage property was sold in February 2009 at Kshs.4.5 million. It is interesting that in 1996 the same property was sold at an inconclusive contract at Kshs.4.5 million. It would appear that while all property in Kenya appreciate in value, the value of the mortgaged property remained static for 13 years. Be that as it may I will take the value of the property to be Kshs.4.5 million in February 2009. The Plaintiff in my Judgement is entitled to the value of suit/mortgaged property at Kshs.4.5 million with interest thereon at the prevailing interest charged on the mortgage loan in February 2009, which was 27% p.a. I have taken into account the fact that until August 2009, the Plaintiff was living in his house and was not paying rent.

I have considered that the Plaintiff has not specifically prayed for an order of general damages for loss of his property. Neither has he prayed for the value of his property. However, the Plaintiff has at paragraph (g) of his prayers made an omnibus prayer asking this court for any other or further relief the court may deem fit and expedient to grant.

If the Plaintiff had sought a professional advice this omnibus prayer would not have been necessary. I have looked at the nature of this claim. I have also considered the expressed opinions by this court and the Court of Appeal, and especially what in their opinion the Plaintiff ought to do. I have also considered that in all appropriate cases this court should not unnecessarily prolong matters. I have specifically considered Article 159 of the Constitution of Kenya which requires this court to expeditiously and without undue delay dispense justice. I have also considered Section 1A and 1B and Section 3A of the

Civil Procedure Rules 2010. I have specifically considered Section 1A which states the overriding objectives of this court as follows:-

Section 1A of the Civil Procedure Rules 2010 states:-

“(1) The overriding objective of this Act . . . is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act . . . seek to give effect to the overriding objectives specified in subsection (1).”

Section 1B gives the duty of the court in matters governed by the Act. It states:-

“(1) For the purpose of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purposes of attaining the following aims:-

(a)the just determination of the proceedings;

(b)the efficient disposal of the business of the court;

(c)the efficient use of the available judicial and administrative resources;

(d)the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”

Article 159 (2) of the Constitution states that:-

“159 (2) in exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) justice shall be administered without undue regard to procedural technicalities.”

Having taken the above constitutional provisions and those of the Civil Procedural Rules 2010, I herewith exercise my discretion to allow the said omnibus prayer (g) under which I enter judgment for the Plaintiff for Kshs.4.5 million with interest at 27.5% p.a. with effect from 9th February 2009.

I cannot conclude this judgment without making this generally disturbing observation, that, a customer is loaned Kshs.650,000/= in 1989. Within a few years he is in arrears and soon his property is auctioned at an inconclusive auction pursuant to which a deposit of 25% is paid, which is actually enough to clear the loan arrears and balances. In 2009, the same property is sold by private treaty at the same price of Kshs.4.5 million it was meant to be sold 13 years earlier. The entire Kshs.4.5 million is taken by the bank, which in 2009, still required more than Kshs.11 million from the chargor. That can easily be Kshs.15 million now. Really where is justice? Banks cannot just hide behind the contracts they make, regardless of how unjust they are, to literally destroy their customers. Without their customers the banks cannot operate. A time has come for banks in Kenya to look into the eyes of their customers and answer the question: Are banks Kenyans? Or have they just entered Kenya for business?

Banks in Kenya reign large. I am reminded of a predator who after killing the prey is not satisfied to leave the carcass to the vultures, but becomes both the predator and the vulture, killing the prey and gleaning the meat from the carcass to ensure the prey is really dead. I am also reminded of a robber killing his victim and not only attending his funeral, but insisting on carrying the casket to the grave to confirm that his victim is dead and buried.

Else, how does one explain a situation or case at hand? Wasn't there no time when the Defendant in this matter could say "*this is the case and time to close this account?*" It is a sorry state of affairs in our country. As all sectors of our society are being reformed, banks should not be left behind. They need to look into the eye balls of their customers and answer the question: "Are banks Kenyans?"

I am persuaded that justice demands that judgement be entered for the Plaintiff, as I hereby do, as follows:-

(a) Kshs.20,662.80/= with interests at 27.5% p.a. with effect from 12th November 1996 till payment in full.

(b) Kshs.4,500,000/= with interest at 27.5% p.a. with effect from 9th February 2009 till payment in full being the value of the suit premises from date of sale.

(c) Costs of the suit with interests thereon at court rates.

This is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 26TH DAY OF APRIL 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Captain J.N. Wafubwa - the Plaintiff in person

M/s Macharia for the Defendant

Teresia - Court clerk