



REPUBLIC OF KENYA

High Court of Kisii

Petition 49 of 2011

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
2,3,19,20,21,22,23,27,28,31,40,43,47,64,165 & 259 OF THE CONSTITUTION**

**JOSEPHINE NYABONYI MARIONGA.....
.....PLAINTIFF**

VERSUS

AGRICULTURAL FINANCE CORPORATION.....ST RESPONDENT

NIXION ODHIAMBO OKUMU T/A JIONI CONSULT AUCTIONEER.....^{2ND} RESPONDENT

ISMAEL NYABUTI JOSEPH.....^{3RD} RESPONDENT

RULING

1. The petitioner filed a petition dated 28th July, 2011 on court the same day seeking:-
 - a) *A declaration that the sale of LR. CENTRAL KITUTU/DARAJA MBILI/2309 by Public Auction on 17th march, 2011 was irregular, unlawful, null and void and was in contravention and infringement of the petitioners constitutional rights.*
 - b) *General damages and an order inhibiting the 3rd defendants title until the petition is heard and determined.*
 - c) *A permanent injunction do issue restraining the third respondent from evicting the petitioner from the suit property until the petition is heard and determined.*
2. Contemporaneously with the petition, the petitioner filed a Notice of Motion under certificate of urgency seeking similar prohibitory and injunctive orders. The application was supported by an affidavit sworn by the petitioner on 28th July, 2011. The petitioner averred that on 30th October, 2008 she applied for a loan of Kshs.200,000/- from the 1st Respondent. The loan was secured by land parcel No. Central Kitutu/Daraja Mbili/2309 (hereinafter referred to as the suit property). The petitioner averred that she made monthly payments up to the tune of kshs.139,000 inclusive of 19,000 made on 11th March,2011. She however stated that on 27th April, 2011 while on normal business, she found a poster pasted on the Notice Board at the District Commissioner's office Kisii advertising the suit property for Public Auction on 17th March, 2011.
3. The petitioner was thus prompted to make an official search on the same day during which she

established that the suitland was still in her name, but that on 4th July, 2011 she established that the suitland had been sold by Public Auction on 17th March, 2011 and transferred to the 3rd Respondent. The petitioner contended that the 1st respondent did not serve her with the requisite 45-day mandatory notice to redeem her property before the sale; and further that the respondents did not notify her of the intended sale of her property by Public Auction on 17th March, 2011. The petitioner also averred that despite having paid Kshs.19,000 on 11th March, 2011 which sum was received and acknowledged by the 1st respondent thereby creating an impression that they could not sell the petitioner's property, the auction was conducted on 17th March, 2011 without notice to her. She further averred that on 8th July, 2011 the 3rd Respondent gave her 30 days to vacate the suit premises to pave way for vacant possession for the 3rd Respondent. The petitioner's case is that she has carried out improvements on the suitland valued at Kshs. 2.7M, and therefore that the purported sale of the suit property on 17th March, 2011 was not only irregular and illegal but it was null and void. She contends that the action of the respondents has caused her mental anguish, embarrassment and scandal, hence this application.

4. The 3rd respondent opposed the application and averred that he acquired the suit property as the highest bidder during the sale by way of Public Auction on 17th March, 2011, and that as sole proprietor and owner of the suitland, he has a legal right to take possession of the same. The 3rd respondent also averred that he is not linked in any way to the agreement between the petitioner and the 1st respondent and that the petitioner's prayers are overtaken by events and as such are not awardable as prayed.

5. The 1st and 2nd respondents also opposed the application vide the replying affidavit sworn by **Sheila Sanga**, a Legal Officer at the 1st respondent Corporation. The stated affidavit, comprising 16 paragraphs is to the effect that the petitioner who has defaulted on loan repayments is not entitled to the orders sought. The deponent says that despite her many promises to repay the loan balances after being given an opportunity to do so, the petitioner has remained in perpetual default. That in the circumstances, the 1st respondents statutory power of sale had crystallised. She prays that the petitioner's application be dismissed with costs.

6. It is the petitioner's case that the purported Public Auction was illegal as she was not served with a statutory notice. Before a chargee exercises their statutory power of sale the following conditions must apply:-

- a) *The impending sale must be advertised to the public.*
- b) *The chargor must be informed of the same.*
- c) *There is no right of foreclosure under the Registered Land Act.*
- d) *Pursuant to an amendment introduced by Act number 14 of 1991, statute law (Repeal and Miscellaneous Amendment) Act where the charged land is agricultural land the chargee shall, at least one month before exercising his power of sale, serve on the District commissioner of the area in which the charged land is situated of his intention thereof.*
- e) *Further, where a chargee had appointed a receiver and he intends to pursue the remedy of sale (after abandoning the receivership he must serve a fresh 3 months notice as aforesaid.*
- f) *Where after the sale, the debt is not fully discharged by the proceeds from the sale, the chargee is further entitled to file a suit for the recovery of the balance.*
- g) *Upon the sale, the chargee himself does the transfer of the property.*

In addition, the sale must be subject to the Auctioneer Rules 1997.

7. Pursuant to these rules, the auctioneer should, upon receipt of a letter of instruction, write to the

owner of the property giving such owner not less than forty five days notice within which to redeem the property by payment of the amount due as set out in the letter of instruction. If the forty five days expire and the owner has not paid, the auctioneer should give at least 14 days notice for the sale of the property. In total therefore, the earliest period within which the property may be sold appears to be about sixty days. Pages 187 and 188 of Principles of Conveyance and Practice by **Dr. Tom Ojienda**.

8. Upon perusal of the papers in this matter, it appears that the 1st & 2nd respondents sent the Statutory Notice of Sale addressed to one **Josephine Nyabonyi Marionga** of P.O. BOX 2156, Kisumu. The signatory of the redemption Notice and Notification of sale was one **Carolyn Moraa**. From the above facts, the only conclusion I can draw is that the petitioner never received the purported notice of statutory sale.

9. The above notwithstanding, the issue here is whether the petitioner has met the conditions for the grant of an injunction as set out in the case of Giella –vs- Cassman Brown & Co. Ltd[1973] EA 358. These conditions are that:-

- a) *The petitioner must demonstrate that he has a prima facie case with the probability of success.*
- b) *The petitioner must demonstrate that she will suffer irreparable loss and damage unless the order sought is granted and*
- c) *When the court is in doubt, it will decide the case on a balance of convenience.*

10. The facts giving rise to this application are not in dispute.

The petitioner took a loan from the 1st respondent for which she charged the suitland. She has been in default of the repayments despite being given an opportunity to pay up. On 17th March, 2011, the suit property was sold by Public Auction and transfer thereof was made into the name of the 3rd respondent who now has a title deed and wants vacant possession.

11. Considering the above facts, I do not think that the petitioner has demonstrated that she has a prima facie case with a probability of success, nor has she demonstrated that unless the order sought is granted, she will suffer loss that cannot be compensated in damages. It is not denied that the petitioner was in arrears as at the time of sale. It is also not in dispute that the 3rd respondent is in possession of a title deed; this being the case, and applying the principles enunciated in the **Giella case** and the cases of Elantra Properties Ltd –vs- paramount Universal Bank & others- Nairobi HCCC.NO. 707 of 2006 and Nyanza Holdings Ltd & 2 others –vs- City Finance Bank Ltd & another- Nairobi HCCC.NO.251 OF 2008, once a property is sold and transferred to a third party, at an action, remedy is in damages. The petitioner's remedy in the instant case is in damages.

12. In the circumstances therefore I do find and hold that the petitioner's prayers for injunction are overtaken by events. The 3rd respondent is already registered as the absolute owner of the suitland and as such the prayers cannot be granted. Accordingly, the Notice of Motion dated 28th June, 2011 is hereby dismissed with costs to the respondents.

13. Finally, the delay in delivering this ruling is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July, 2012

Dated and delivered at Kisii this 11th of October,2012

**RUTH NEKOYE SITATI,
JUDGE**

In the presence of:-

Mr. C. Okenye for Abobo (present)for plaintiff

M/s Oduk & Co. (absent)for respondent

Mr. Bibu - Court clerk.

**RUTH NEKOYE SITATI,
JUDGE.**