



REPUBLIC OF KENYA



KENYA LAW
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**Mungai v Co-operative Bank of Kenya (Environment & Land Case
4 of 2018) [2022] KEELC 3248 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 4 OF 2018**

JG KEMEI, J

JULY 28, 2022

BETWEEN

RACHAEL WANJA MUNGAI PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA DEFENDANT

JUDGMENT

1. The plaintiff filed suit on 9/1/2018 seeking the following orders-
 - a. A declaration that the plaintiff is the bonafide purchaser of value of the property known as L.R. No. 12959/3 I.R No. 42774 Juja Township.
 - b. An order to the defendant to transfer the property known as I.R No. 12959/3 I.R No. 42774 Juja Township to the Plaintiff.
 - c. Cost of the suit plus interest.
 - d. Any other order the Court deems fit.
2. The Plaintiff avers that she purchased the suit property in an auction held on 9/4/2014 and paid 25% deposit which deposit was duly acknowledged. That despite being the highest bidder and paying the deposit the Defendant has neglected to transfer the property to her.
3. The Defendant has denied the Plaintiff's claim vide a defence filed on 7/2/2018 and amended on 13/6/2018.
4. Whilst acknowledging that the property was sold pursuant to its Statutory Power of Sale the Defendant admits that the Plaintiff emerged the highest bidder at the bid sum of Kshs. 4,750,000/- whereupon the Plaintiff paid the deposit of Kshs. 1,142,500/- on 9/4/2018 and dully executed a Memorandum of Sale on even date.



5. That before transferring the property the Court of Appeal issued an order on 10/4/2014 in HCCC No. 235 of 2008 stopping the sale of the properties, the suit property included.
6. That the Plaintiff was informed of the said Court orders by Valley Auctioneers, then auctioneers in this suit and she indicated her willingness to wait until the Court of Appeal suit was concluded. The Defendant contends that in light of the Court orders the suit and that the Plaintiff is yet to fully pay the purchase price, the suit is frivolous, vexatious and should be dismissed.
7. Finally that it is not under any application to release the original title and transfer documents to the Plaintiff since the Court of Appeal stopped the sale of the suit land on 10/4/2014.
8. At the hearing the Plaintiff testified and relied on the witness statements dated 29/12/2017 and produced documents marked PEx No. 1 – 12 in support of her case.
9. The witness stated that she saw an advert in a local daily newspaper by Valley Auctioneers of a public auction slated for 9/4/2014 for which she attended the auction and bid for the suit land and emerged the highest bidder at Kshs. 4,750,000/-. Her bid was accepted and she duly paid 25% deposit and executed a Memorandum of Sale on even date.
10. That she paid a further deposit of Kshs. 2.1m to the bank towards the purchase. That later Kshs. 2.5m was refunded to her and 25% was retained by the bank.
11. She stated that save for 25% deposit she had made arrangements for her bank Jamii Bora had to finance the balance of the purchase price and in fulfilment the Jamii Bora issued a professional undertaking to the Defendant.
12. That the balance of the purchase price was however not released to the bank because of a Court order stopping the Defendant from selling the suit land. She stated that she was informed of the Court order which orders came after the auction had been completed.
13. The witness stated that she did not write to the bank inquiring why the transaction had stalled but sought advise from the Advocate that her bank Jamii Bora also wrote to the Defendant asking for the release of the documents on 19/6/2014.
14. She informed the Court that other properties that were subject of the Court of Appeal order have been transferred and were not hers.
15. George Adhiambo Nalugala testified on behalf of the Defendant. He introduced himself as a business banker at the Co-operative Bank, the Defendant herein.
16. The witness relied on his witness statement dated 2/8/2021 as his evidence in chief. In addition he produced documents in support of the Defendant's defence marked DEx No. 1-3.
17. It was his testimony that the suit property had been charged to the bank to secure banking facilities to one Peter Nganga Muiruri. In default of his obligations to repay the loan the Defendant in its exercise of statutory power instructed Valley Auctioneers to sell the property by way of public auction on 9/4/2014.
18. That the Plaintiff emerged the highest bidder having bid for the property at Kshs. 4,750,000/- and paid 25% deposit and executed a Memorandum of Sale in which the balance of the purchase price was paid within 90 days from the date of the sale.
19. That aggrieved by the sale the said Peter Nganga Muiruri filed a suit against the defendant in HCCC No. 235 of 2008 seeking to stop the sale. That on 31/7/2013 the suit was dismissed. Muiruri filed an



- appeal against the High Court decision and obtained an order on 10/4/2014 stopping the sale of the properties (suit land and Nyandarua/Nandarusi/332).
20. That on 16/7/2014 the defendant informed Jamii Bora Bank who had given a bank guarantee to pay the balance of the purchase price of the new development restraining it from transferring the property to the plaintiff. The plaintiff on learning of the new development through Valley auctioneers expressed her willingness to wait until the appeal was concluded. Consequently on the request of the Plaintiff the bank refunded Kshs. 2.1m which was over and above the deposit tendered by the Plaintiff to the bank.
 21. The witness testified that the same was not rescinded. That Jamii Bora issued a professional undertaking in favour of the bank to pay the balance of the purchase price to the defendant which was due on 30/8/2014 and the reason why it did not pay was because of the Court orders.
 22. Further he stated that he was not aware of the orders of the Court of Appeal had been discharged.
 23. Parties filed written submissions which I have read and considered.
 24. The plaintiff submitted and gave a detailed background of the facts leading to the suit.
 25. The plaintiff submitted that the provisions of section 99 of the *Land Act* sought to protect purchasers from acts of the defendant who seek to unlawfully retain the plaintiff's rightful property from bonafide purchaser for value.
 26. The plaintiff further submitted that the plaintiff complied fully with the terms of the memorandum of sale showing her commitment to the purchase. That at the time the injunction was granted on 10/4/2014 the sale to the plaintiff was complete on 9/4/2014. The injunction did not stop the auction but only the register and transfer pending the hearing and determination of the intended appeal.
 27. On the aspect of a bonafide purchaser the plaintiff relied on the case of *Buxstone Limited v Jaswant Singh and Brothers Limited* [2021] eKLR where the Court held that the applicant was a bonafide purchaser at a public auction.
 28. As to whether the interlocutory injunction is still enforceable the plaintiff submitted that no appeal has been filed 8 years in the matter and as such the injunction is now spent. See order No. rule 6. That there were no orders issued by the Court of Appeal. That the defendant did transfer property parcel No. 332 registered in the name of Francis Kangata Kiragu which property as also subject to the injunction orders raised by the Court of Appeal on 10/4/2014.
 29. Lastly the plaintiff submitted that it is entitled to the reliefs sought.
 30. The defendant opposed the Plaintiff's case and submitted that the Court of Appeal stopped the sale of the suit land vide its ruling dated 10/4/2014, a fact that is not disputed by the parties. That following the court orders, the Plaintiff was refunded Kshs. 2.1m as she expressed her desire to await the outcome of the appeal filed by the previous borrower / owner of the land.
 31. The defendant submitted that this court being a lower court to the Court of Appeal is bound by the decisions of the Appellate Court. That granting the orders sought in the plaint will be to overturn a decision of the Superior Court. See the decision of *Mwai Kibaki Vs Daniel Toroitich Arap Moi* [1999] eKLR. That the honourable court cannot confer itself the jurisdiction to reverse a decision of the Court of Appeal. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
 32. It was argued on behalf of the defendant that the agreement for sale of the property between the defendant and the plaintiff had been frustrated by actions out of control of both parties.



33. That in the circumstances specific performance cannot lie as the contract suffers from frustration. That the orders of the Court of Appeal stopping the sale of the suit property is a hindrance to the completion of the contract. That the Court of Appeal order falls squarely under the doctrine of frustration.
34. The defendant in expounding on this point relied on the case of *KCB Vs Kipngeno Arap Ngeny* CA No. 10 of 2001 (Nairobi).
35. The defendant argued that the circumstance of this case does not fall within the exception of the case of frustration in contract stated in the above quoted case which requires a party who wishes to rely on a frustrating event to plead the particulars of facts which they seek to rely on resulting in the frustration of contract.
36. That in the case of *Odd Jobs -vs- Mubia* [1970] EA 476 the Court summarized the exceptions as;

“ A Court may base its decision on an upleaded issue if it appears from the course followed at the trial that the issue had been left to court for directions.”
37. The defendant admitted not pleading the issue of frustration in his pleadings but urged the Court to determine that the contract of sale was frustrated hence the need to set it aside.
38. The defendant further submitted that specific performance does not lie in this case for the following reasons: the Defendant paid a refund of Kshs. 2.1m to the plaintiff; Defendant has never received a demand letter from plaintiff complaining and failure to complete; plaintiff failed to give sufficient reasons as to why she failed to pay the balance of the purchase price in accordance with the memorandum of Sale; plaintiff has not occupied the suit land.
39. On the issue of whether the injunction granted on 10/11/2014 has lapsed or not, the defendant submitted at length and that the injunction is still in force; the Civil Procedure Rules do not apply to the Court of Appeal; there is in existence a court order that prevents the dealing in the suit land.
40. Having read and considered the pleadings, the evidence adduced on record the written submissions and all the matters placed before me in this case, it is my view that the question for determination are:
 - a. Whether the plaintiff is entitled to the property;
 - b. Whether the sale was frustrated;
 - c. Whether specific performance should be granted;
 - d. Costs of the suit.
41. The background of this case is important. I shall try to lay it out to be able to assist in giving scope to the resolution of the matter before me.
42. The suit property with other lands has a chequered litigation history dating back a decade or more.
43. According to the certified copy of the title on record, the land became registered in the name of Silvester Muiruri Gichuhi on the 16/7/1987. On the 24/1/1995 an assent was registered in the name of Peter Nganga Muiruri as a beneficiary of the estate of Gichuhi. The record also shows that the said property as charged to Co-operative Finance Ltd on 24/1/1995 and on 6/7/2004 a transfer of the said charge was registered in favour of the defendant.
44. Aggrieved by the said transfer of charge from Co-operative Finance Ltd to the defendant and the issuance of statutory notice to sell the property the said Nganga filed a suit in HCCC No. 235 of 2008 where he challenged the 1st defendants exercise statutory power of sale on the ground that the charge



was to Co-operative Finance Ltd and the 1st Defendant was a stranger and order that the Land Registrar do discharge the charges.

45. The court on hearing the case dismissed the Plaintiff's case on the 22/5/2014.
46. Aggrieved by the decision of the court the said Nganga filed an application in the Court of Appeal No. 232 of 2013 in which he sought the orders as follows:-

“The 1st respondent its servants, agents, representatives, successors or assignees be restrained by an order of injunction from applying or presenting for registration or registering a transfer or certificate of sale of the charge dated 6th October 1994 between Peter Muiruri Njuguna and Co-operative Finance Limited on Title Number Nyandaura/Nandarusi/332 from Co-operative Finance Ltd to the 1st respondent and restraining the Respondents or any of them from selling, transferring, disposing off or alienating Applicant's title No. Nyandarua/Nandarusi/332 and LR No. 12959/3 or howsoever dealing with the said titles in any manner defeating the Applicant's absolute title to ownership possession and use thereof pending hearing and determination of the intended appeal.”

47. In the meantime arising from default in paying the loan the defendant issued a statutory notice to realize the security and through the firm of Valley Auctioneers advertised the property for sale by way of public auction which took place on 9/4/2014.
48. Arising from the said auction the following are not in dispute: the plaintiff bid in the auction and emerged the highest bidder; she paid 25% at the fall of the hammer; and fully executed a memorandum of Sale and was issued with a Certificate of Sale on even date. Subsequently, the plaintiff paid an additional Kshs. 2.1m towards the purchase price. In addition it is not in dispute that she procured financial facility from Jamii Bora bank for the payment of the balance of the purchase price, which bank gave a professional undertaking to pay the balance of the purchase price, which undertaking was accepted by the Defendant.
49. Unknown to the parties herewith the Court of Appeal issued an injunction in CA 232 of 2014 in favour of the previous borrower restraining the defendant inter alia from selling, transferring, disposing off or alienating the suit land Nyandarua/Nandarusi/332 and the suit land L.R. No. 12959/3 or howsoever dealing with the said titles in any manner defeating the Appellants absolute title to ownership possession and use thereof pending the hearing and determination of the intended appeal.
50. None of the parties have disputed the said orders of the Appellate Court.
51. Before I delve into the issues before me for determination it is imperative that I consider the impact of the Court of Appeal orders as presented by the parties in evidence.
52. From the onset it is clear that the suit land in this case is subject of the appellate orders as cited above. It is also clear that the previous owner Nganga was not made a party to this suit. The common denominator between this case and that in the Court of Appeal is the defendant.
53. Following the service of the orders to all the parties in this case it is regrettable that none has tendered evidence to show if an appeal was filed. If yes if the issue has been prosecuted to its conclusion and if in the affirmative the outcome of the said appeal.
54. As matters stand now and going by the evidence tendered by the parties, both have not shed any light on the position of the appeal if it was ever filed.



55. Should the appeal be pending in the Court of Appeal, then there is a high likelihood that by determining this matter in the manner it has been filed will create prejudice in view of the existence of a pending appeal in the Court of Appeal.
56. No evidence was tabled or received to the contrary and in view of the matters pending before the Court of Appeal with respect to the suit property, it is fair in the circumstances to strike out the suit.
57. In the end and for the reasons stated above the suit be and is hereby struck out.
58. I make no orders as to costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF JULY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Mugure holding brief for Mureithi for Plaintiff

Omtitah holding brief for Ms. Kahu for Defendant

Court Assistant – Phyllis Mwangi

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