



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 69 of 2002

BEATRICE BOSIBORI MATOYA..... PLAINTIFF
VERSUS
STANDARD CHARTERED BANK KENYA LIMITED..... 1ST DEFENDANT
WILFRED BISONGA ONDERI..... 2ND DEFENDANT

JUDGEMENT

1. This suit was filed sometimes in January 2002, over the several years it has remained pending in this court, it was handled by several Judges by way of interlocutory applications. The hearing started before **Kasango, J.** who recorded evidence by the plaintiff was transferred from this station before completing the matter. I took over the conduct of this matter on 6th July 2009, after parties agreed that the matter could proceed from where **Kasango, J.** left it. The record shows that this suit was amended on 9th June 2004 and re-amended on 28th October 2005. Through those amendments, Standard Chartered Financial services Limited, which had been added as a Defendant in an earlier amendment, was removed from the pleadings.

2. According to the further amended plaint, the Plaintiff instituted this suit against Standard chartered Bank limited, 1st Defendant and Wilfred Bisonga Onderi the 2nd Defendant. The Plaintiff's claim is principally for damages for wrongful eviction and loss of properties which was a house built on her property known as Ngong/Ngong/14260 (hereinafter referred to as the suit premises) and other household properties which were destroyed when she was evicted on October 2001 by the 2nd defendant. In the alternative, the Plaintiff sought to be awarded the equivalent market value of the suit premises. She also prayed for general damages and costs of the suit.

The 1st Defendant filed an amended defence denying liability in general and specifically denied

the particulars of fraud pleaded by the Plaintiff. I took evidence from Kich Awecho (PW2), and also defence evidence by the witnesses, of the 1st Defendant. The 2nd Defendant did not offer any evidence.

3. I shall briefly summarize the background of this suit as per the pleadings and the evidence on record. The Plaintiff was unrepresented, she testified that she was the registered owner of all suit premises. The Plaintiff was an employee of the Standard Chartered Financial Services Ltd, she produced a letter of appointment dated 11th, and 13th November 1986. While employed by the Standard Chartered financial Services Ltd the Plaintiff applied for a house of Kshs. 605,500/- which was approved and the Plaintiff used the proceeds to purchase the suit premises. The costs of the plot was kshs.180,000/- and kshs. 425,000/- was to be used for the construction of the house.

4. In consideration, of the loan advanced, standard Chartered Financial Services Ltd created a charge to secure the borrowing. There was a restructuring after which standard Chartered Financial Services ceased to operate and all the outstanding matters were transferred to the 1st Defendant. The Plaintiff was subsequently granted a second loan of Kshs. 295,000/- and a further charge was created to secure the borrowing. Sometimes in October 1994, the Plaintiff was declared redundant. She was offered and she opted for early voluntary retirement scheme as per the terms and conditions stated in that letter of early retirement which plaintiff accepted. On 5th January 2000, the 1st Defendant served the plaintiff with a notification of sale through M/s Dolphine Auctioneers giving her notice to sell the suit premises by public auction on 17th March 2000 unless the loan was regularized.

5. According to the Plaintiff she filed a suit being HCCC No. 278 of 2000 Milimani and she was issued with an order directing the 1st Defendant to issue a fresh statutory notice to replace the one issued on 5th January 2000. The plaintiff alleged that the 1st defendant persisted in trying to auction her property despite an order issued by **Mbaluto J** on 6th July 2001. The Plaintiff is accusing the 1st and 2nd Defendant of collusion and fraud of the sale of the suit premises. It is contended by the Plaintiff that the 1st Defendant fraudulently obtained a land control Board consent dated 6th June 2001, which disclosed the 2nd Defendant when the sale had not taken place as the purported sale took place on 6th July 2001. It is further alleged

that 2nd Defendant who was the manager at the 1st Defendant's Moi Avenue Branch, was aware of the order directing the maintenance of the status quo but both the 1st and 2nd Defendants went ahead to commit the fraud.

6. It is the 1st Defendant who proceeded to sell the suit property even though there was no formal transfer of charge and further charge to itself. The Plaintiff denied ever executing such a transfer of charge in favor of the 1st defendant from the SCFS. The 2nd Defendant is also accused of forcefully taking possession of the plaintiff's premises and throwing her out of the suit premises without first obtaining a court order for vacant possession. According to the Plaintiff, the 2nd Defendant was financed by the 1st Defendant to defeat the plaintiff's right to redeem the suit property as the plaintiff had obtained the consent to subdivide the land so as to sell a portion to redeem the loan. During the hearing of this matter, the Plaintiff confirmed she is not pursuing the claim for pension and provident fund. However, the Plaintiff said she is seeking for loss of household goods destroyed, and also the value of her house that was demolished and damages for wrongful sale of the suit premises.

7. Mr. Kich (PW2) of Hectares and Associates conducted a valuation of the suit premises on 26th August 2008. He was instructed by the Plaintiff to give a valuation report of the bungalow that had been demolished and also to give a valuation of the property that is constructed on the suit premises. He prepared the report which was produced in evidence. According to the report, the demolished bungalow was valued at Kshs. 1.3 million. He based his valuation on photographs which were used in earlier valuation report was prepared by Joe Musyoka valuer on behalf of the 1st Defendant.

8. The 1st Defendant relied on the evidence of **Peter Frankine Jenar (DW1)** a senior manager with the 1st Defendant since 1988. He testified that in 1995 he moved from standard Chartered Finance Services Ltd which is a wholly owned subsidiary of the 1st Defendant. He confirmed that he used to work at SCFS and was involved in recovering of debts and non-performing loans by S.C.F.S. The Plaintiff was granted a loan according to the Charge dated 8th August 1992 and a further charged dated 20th January 1992 as per the bundle of documents he produced as exhibits. Although the loan was given by S.C.F.S they are not parties to this suit. This witness confirmed that as at the time the letter of offer of the loan was issued, the plaintiff was an employee of the 1st Defendant. The Plaintiff opted for the early retirement and by that

time, the loan was about Kshs. 900,000/= which was outstanding. The Plaintiff fell in arrears and the 1st Defendant made a demand according to the letter dated 9th August 1999, addressed to the Plaintiff which was sent to her by registered post. No payment was forthcoming and the plaintiff was issued with a statutory notice which was issued on behalf of S.C.F.S it was personally served upon the Plaintiff.

9. According to **Peter Wainaina Mwaura (DW3)** a process server who testified that he received the letter dated 9th March 2000 from the firm of Amollo and Gacoka Advocates and served it upon the Plaintiff at her home in Ngong. He prepared an affidavit of service which was produced in evidence. Before the property was sold, a valuation report was conducted by **Joe Mutinda Musyoki (DW4)** dated 5th April 2001. He testified that he was instructed by the 1st Defendant to conduct a valuation report on the suit premises to establish both the market value and the value of forced sale in an auction. He visited the suit premises and the property was valued for Kshs. 1.4 million for the open market and for purposes of a forced sale, Kshs. 900,000/-.

10. The 1st Defendant also relied on the evidence by Kinyanjui Wajuu (DW1) the Auctioneer who conducted the sale of the suit premises. He confirmed that he received a letter from SCFS to sell the suit premises to recover a sum of Kshs. 1,798,595.75. He prepared the statutory notice giving the plaintiff 45 days which was served upon the Plaintiff. The auction was scheduled on 6th July 2001. The auctioneers testified that he had a couple of bidders but he accepted the bid of Kshs. 1,050,000/- because the property had a reserve price of 900,000/- according to the valuation report by Joe Musyoki. He told the court that the auction took place at 11.00 a.m. and by 11.30 a.m. when he received a call from the firm of Amollo Gacoka Advocates informing him a status quo order had been issued by the Mbaluto J he had already declared the 2nd Defendant a buyer. During cross examination, the auctioneer confirmed that the highest bidder Wilson Ondari was an employee of the 1st Defendant. When the 2nd Defendant was declared the highest bidder of the suit the property he produced a letter indicating that he was going to get a loan to buy the property. The letter contained an undertaking by the 1st Defendant to pay the purchase price. Therefore the Auctioneer prepared a report and issued the fee note. He did not take any cash but accepted the undertaking issued by the 1st Defendant.

11. All the parties filed written submissions, however, the 2nd Defendant did not adduce any evidence but raised issues of law in the written submissions, to wit the Plaintiff's claim for loss of belongings was not specifically pleaded or proved. The law is clear as enunciated by the Court of Appeal in the case of **Hahn v Singh [1985] KLR pg 716** where their Lordships held that:

“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves. The judge was right in holding that the appellant had failed to prove his claim for the depreciation of the vehicle after the accident.”

I have gone through the pleadings by the plaintiff there is no specific pleading for the special damages suffered as a result of the wrongful eviction by the 2nd Defendant. Although the 2nd Defendant failed to adduce evidence, the basis upon which he evicted the Plaintiff was not explained. Although the claim by the Plaintiff that the 2nd Defendant took law into his hands when he evicted the Plaintiff is a valid point, the Plaintiff failed in her evidence to give the particulars of the damages that she suffered as a result of the unlawful eviction. This prayer therefore, falls by the wayside.

12. A fundamental issue was also raised by the 1st Defendant that challenged the suit against the 1st Defendant who was wrongly sued because the contract being the charge and the further charge were entered into between the Plaintiff and the SCFS who were not parties to this suit. According to Mr. Gacoka, learned counsel for the 1st Defendant, no orders can be made against the 1st Defendant. Moreover, the proper statutory notices were issued. Auctioneers were instructed to sell the property and the property was properly sold to the 2nd Defendant who was the highest bidder. As regards damages, it was argued that the Plaintiff failed to adduce evidence in support thereto.

13. On the issue of whether the 1st Defendant was properly sued, as pointed out earlier, the Plaintiff was representing herself. This suit was amended variously when the name of SCFS was removed from the pleadings. However, going by the evidence on record, I am not satisfied that it is correct that the 1st Defendant had nothing to do with the sale of the Plaintiff's property. According to the evidence of the by DW1, SCFS is a wholly owned subsidiary of the

1st defendant. The statements of the loan accounts regarding the subject loan in question were in the name of 1st Defendant. The instructions to value the suit property were given to Joe Musyoki Consultants by the 1st Defendant. The transfer after the suit premises were sold was effected to the 2nd Defendant by the 1st Defendant. It is for those reasons I find the contention that the 1st Defendant was wrongly sued lacking credibility besides the same being raised too late in the submissions.

14. The Plaintiff argued that the sale was conducted when there was an order maintaining the status quo as issued by **Mbaluto J** on the 6th July 2001. Being guided by the pleadings on record I find as if this issue was resolved by Njagi **J** in his ruling dated 12th July 2003, Where his lordship *held*:

“Reference to the copy of proceedings which was produced by the Plaintiff does not show a court order stopping the sale. The order read, “By consent the parties to maintain status quo as of this hour 11.40 a.m. until 26.7.2001 when the matter will be heard inter partes. The respondent to be served forthwith.”

T. Mbaluto

JUDGE

To call this order an order stopping the sale is, with respect, a misconception. If the court meant and intended to stop the sale, which was scheduled for 11.00 a.m. on that same day, it would have said so in the clearest of terms. The explanation given by learned counsel for the 1st and 2nd Defendants is more plausible.”

This ruling therefore determined the issue that there was no court order that validly stopped the sale.

15. This now leads me to the final issue on whether the 1st and 2nd Defendants colluded and sold the Plaintiff's suit property fraudulently. It is trite law that a chargee has a duty to exercise care and conduct the sale of a charged property in good faith. Was this the case in regard to the suit premises? The plaintiff was a former employee of SCFS a wholly owned subsidiary of the 1st defendant. Although the plaintiff was in arrears of the loan repayment, there is correspondence on record where the plaintiff sought indulgence by the 1st defendant so as to subdivide the suit premises and sell a portion to redeem the loan. Am alive to the fact that the 1st defendant was not obliged in law to accept the request. The plaintiff also filed a suit to

stop the auction and indeed an order to maintain the status quo was communicated after the fall of the hammer according to the evidence by the auctioneer and that I similarly accept as a fact.

16. However one issue which causes me considerable concern is the way the 2nd defendant, a manager with the 1st defendant was declared the buyer. The auctioneer told the court that the second defendant did not pay any money but produced a letter of undertaking by the 1st defendant to provide financing of the suit premises. When was the letter written, and how were the negotiations carried out for a property that was yet to be sold in a public auction in an open and transparent process. This smacks of conspiracy to defraud. To say the least the 1st and 2nd defendant colluded and the whole auction was contrived so that the property was sold to the 2nd defendant. The 2nd defendant did not attend court to give evidence and explain whether he bided for the property at the auction mart and then went to negotiate for the financing or whether he negotiated before the sale.

17. Accordingly I make a finding that the plaintiff was able to prove on a balance of probability that the suit premises was sold through fraud in a contrived public auction. The plaintiff sought for damages in the alternative, being the value of the property before demolition. The value was confirmed by both PW2 and DW3 as Kshs. 1.4 million (Kenya shillings one million four hundred thousand). That is the sum I will award the plaintiff with interest from the date of filing of the suit at court rates as against the 1st and 2nd defendant jointly and severally. The plaintiff represented herself thus there will be no order as to costs save the disbursements paid in this matter.

JUDGEMENT READ AND SIGNED THIS 17TH DAY OF SEPTEMBER AT NAIROBI

M. K. KOOME

JUDGE

