



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 66 OF 2006

SHAFI GREWAL KAKA.....PLAINTIFF

-VERSUS-

DAVID KATANA NGOMBA.....DEFENDANT

JUDGEMENT

Shaffi Grawal Kaka (the plaintiff, filed this suit against David Katana Ngombo (the defendant) seeking for orders of vacant possession of Kilifi/Roka/1098, and a declaration that he is the registered owner of the property. He also seeks that a mandatory injunction do issue compelling the Defendant to vacate and hand over to the Plaintiff vacant possession of the said property.

The background to this claim is that the Plaintiff learnt through a newspaper advertisement in a local daily newspaper that Defendant`s then property known as Kilifi/Roka 1098 measuring 5.017 hectares with all the developments thereon was due for sale by public auction on 30th August 1996 at 11.00am at the offices of the auctioneers. The Plaintiff being interested in the said property, attended the auction on the date time and place advertised, and upon bidding and emerging the highest bidder did purchase the property at Kshs.530,000/- and he was issued with a certificate dated 5th December 1996, by the said auctioneer. Following the same, the property has since been transferred to the Plaintiff who is the currently duly registered owner of the property.

Thereafter Plaintiff approached the Defendant who was still occupying the property and requested him to vacate the same in favour of the Plaintiff. The Defendant pleaded with Plaintiff and it was agreed that the Defendant be given reasonable time to vacate. The Plaintiff has waited for almost TEN (10) years, but defendant has now refused to vacate and has expressly indicated his intention to remain on the property claiming he is still the registered owner. The Defendant`s refusal to vacate has denied the Plaintiff the enjoyment and use of the property and the defendant is now a trespasser.

The Defendant denies that the property was advertised or sold in a public auction as alleged or that the Plaintiff purchased it. He denies that the Plaintiff is the registered owner and denies being served with any formal notice to vacate nor did he ever seek indulgence to remain on the suit property.

It is further pleaded in the alternative and on a without prejudice basis that if the property was sold at an auction, then the sale was fraudulent, irregular and fundamentally flawed, therefore of no legal consequence. It is also pleaded that Plaintiff is guilty of undue and unreasonable delay in instituting these proceedings and does not deserve the orders sought.

At the hearing, the Plaintiff narrated how he attended the auction which had been advertised in the

newspaper (produced as exhibit 1) for the property in question. He was the highest bidder with an offer of Kshs.530, 000/- and he was issued with a certificate of sale (Exhibit 2) by the auctioneer.

Subsequently the property was transferred to him and received a Title in his name. The transfer documents are produced as exhibit 3 and the Title deed was exhibit 4. He has however not been able to use the property because the former owner has remained in occupation despite having been asked to vacate within six months of the sale.

Plaintiff explains that after the auction, he visited the land and had discussion with the defendant, and reached an agreement of departure within six (6) months. This never came to be – a letter dated 5/3/99 from Plaintiff's lawyer to defendant requesting him to vacate, he produced as exhibit Another letter dated 19/10/99 again instructed him to vacate – the defendant in response through the lawyer in a letter dated 12/10/09 said that he had Title to the land and would not vacate. On Cross-examination Pw 1 says he paid the 25% deposit on 30th August and was issued with a receipt and cleared the balance by a banker's cheque the next day. However he did not obtain a receipt for that payment.

The property was sold by the auctioneer on instructions of ICDC and plaintiff stated that if defendant had paid his loan with ICDC he would not know nor would he know whether ICDC issued a statutory notice of sale. A transfer was signed in his favour on 6/12/96 after the Land Control Board gave its consent. As far as Plaintiff is concerned, the sale was proper and there is nothing odd that although the property was situated in Kilifi the auction was carried out in Nairobi.

The Defendant (a retiree) previously worked for ICDC as an Office Superintendent. He only learnt about the auction from Plaintiff when the latter went to his home on 5/03/07. Defendant had no information about such sale and so when Plaintiff asked him to vacate so as to take over, he declined.

Defendant then instructed his advocate to write a letter dated 12th October 2002 (Dexh 2) to ICDC to clarify to him the matter because as far as he knew, he had completed repaying the loan. Defendant also requested for a statement of his account which he has produced as DExhibit 4. He was one of the directors of Tototo Maize Millers and had used his Title as security for the loan advanced to Tototo.

The response ICDC gave him was that there was a credit of Kshs.977/- in the loan account as per D.exhibit 6(a letter dated 20/11/06). So defendant verbally requested for a discharge of the charge in their Mombasa office. He did not get any further communication until he received a court summons requiring him to vacate the land yet he had not even been served with a statutory notice about the intended sale.

The Defendant does not think the auction was proper as the newspaper notice which the plaintiff served on him did not even have a date and it was not clear which newspaper that was. The other curious thing is that the certificate of sale was issued on 5th December 1996 yet the land was sold on 30th August 1996 and the transfer by ICDC did not bear any date.

It is his contention that the Plaintiff is not entitled to ownership of the plot and had the Defendant been notified of the sale, he would have raised an objection. He states that if ICDC gave plaintiff the original Title then that was illegal. His suspicions about the genuineness of the sale is based on the fact that although plaintiff purportedly paid 25% of the value of the land, he did not produce a receipt as proof nor was there any list of bidders so as to establish how many other people attended the auction and what their bids were so as to have plaintiff qualify as the highest bidder.

On cross-examination, the Defendant states that although he does not have statements from ICDC to prove the full repayment of the loan, a letter dated 20th January 2006, shows the account had a credit – which meant he had fully repaid the loan. The Defendant conducted a search which confirmed the property is now registered in the Plaintiff's name, and he confirms he has not applied for nullification of the Title because he was waiting for this case to be finalized.

In the written submissions filed by Mr. Wameyo for the Plaintiff, he argues that the issuance of a

statutory notice does not arise as between Plaintiff and Defendant. This is because the notice of intention to exercise statutory power of sale is issued by the chargee who in this case is ICDC and ought to have been raised before the sale of the subject property. The Defendant failed to join ICDC as a Third Party and so the issue fails. Mr. Wameyo draws this court's attention to the correspondences exhibited by both the Plaintiffs and Defendants and says it is quite clear that the Defendant knew what was going on and was subsequently advised of the sale and there is no rational explanation as to why Defendant did not take up the matter with ICDC upon receiving such information – emphasis is laid on the letter dated 8th March 1999 written by Fatuma Sichale and Co. Advocate. So the Plaintiff is a bona fide purchaser for value without notice and this interest cannot be overtaken by the Defendant's claims.

In response, Mr. Kariuki for the Respondent submits that the purported sale was not public but was an event which took place in a private room somewhere in Nairobi while the property is situated in Kilifi. It is not disclosed who the bidders were and even the advertisement is dubious as it is not clear in which newspaper the same was carried nor does it bear any date and appears to be a print out cutting which cannot amount to a proper notice.

With regard to issuance of a mandatory statutory notice, Mr. Kiarie is insistent that since the same was not issued then the sale was null and void – he cites the decision in **HCCC 293 of 2006, Elizabeth Wambui Njuguna V Hoisy Finance of Kenya Limited** which held that omission to serve a valid statutory notice is fundamental breach of statute which derogates from the Changor's equity of redemption.

What is presented to this court is a printed cutting purported to be an advertisement- it is not clear which newspaper carried out the advertisement or even the date of such advertisement. I however agree with Mr. Wameyo that it was not the duty of the Defendant to issue a statutory notice to the Defendant, that lay squarely with ICDC. However the existence of the statutory notice becomes crucial because the validity of the sale revolves around it – as was aptly observed in the **Elizabeth Wambui Njuguna**, the omission to serve a valid statutory notice is a fundamental breach of statute. The only catch here is that Defendant has not joined ICDC to this suit, so as to make them accountable regarding the statutory notice and this is what distinguishes the present scenario from the **Wambui Njuguna case**, because in the earlier case, the finance institution was actually the Defendant.

Another distinguishing feature is that the Defendant here has not filed any application or counter claim to set aside the sale or declare the same null and void. If ICDC had been joined as a party to this suit, it would have been under an obligation to show how the statutory notice of sale was served, and its non joinder, thus makes the issue raised by defendant on mandatory statutory notice of sale as between him and the Plaintiff, to be a non starter.

Was this a fraudulent deal between the Plaintiff, the auctioneer and ICDC? The particulars of fraud were not pleaded by the defendant – again the non joinder of the finance institution and the auctioneer makes his claim end up being a chase after the wind.

Mr. Kiarie argues that this was just an arrangement in the offices of an auctioneer based in Nairobi and which is why land in Kilifi was being sold in Nairobi – yet again without pleading the particulars of fraud and the non joinder of the auctioneer and ICDC, that remain allegations from the bar – what is presented is that defendant did secure a loan from ICDC using his title as security – the loan was for Kshs.200, 000/- and he executed.

A sale took place on 30.08.96 – where Kshs.530, 000/- was received from the Plaintiff as the highest bidder. This sale was due to the outstanding loan balance which Defendant had not paid. However this is contested on the basis that Defendant made a full repayment and was even advised by a letter that his account had some credit of Kshs.977.20. Actually there is no statement of account given by ICDC to the Defendant showing the loan repayment, what there is, is a letter dated 05/03/97 informing him that his secured asset was sold to recover the loan. Yet again it would not be for the Plaintiff to produce such proof, he simply participated at an auction and if Defendant was persuaded that ICDC acted in bad faith

by instructing for auction of his property, then he ought to have joined them. Plaintiff was a bona fide purchaser for value without notice.

I have considered the letter which gives credit to the Defendant's loan account, and as pointed out by Mr. Wameyo that letter was sent AFTER the property had been sold, meaning there is a probability that what was credited to Defendant's account were the proceeds from the sale and not repayments by Defendant – in any event Defendant has not produced any evidence of final repayments made.

Plaintiff has produced the charge instrument to demonstrate how he acquired the property by way of transfer from ICDC after the auction. Really the Defendant can only have himself to blame if he was dissatisfied with the actions taken by ICDC, then he should have made them a party. No fault can be visited on the Plaintiff for all the woes Defendant alleges.

Consequently my finding is that Plaintiff has proved his case on a balance of probability and I enter judgement in his favour by ordering that the Defendant do vacate the suit premises within the next (ninety) days and hand over vacant possession to the Plaintiff.

2. I declare the Plaintiff as the registered owner of the property being Kilifi/Roka/1098.

The defence is dismissed and I award costs of this suit to Plaintiff.

Delivered and dated this 14th day of December 2010 at Malindi

H A OMONDI
JUDGE

Mr. Kariuki for defendant
Mr. Wameyo for plaintiff