



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

CIVIL SUIT 387 OF 2006

MAINA KAGOMBE.....PLAINTIFF

VERSUS

**SAVINGS & LOAN KENYA LIMITED....
.....DEFENDANT**

J U D G M E N T

The Plaintiff herein took a loan from the Defendant, Savings and Loans Kenya Limited, to the tune of Kshs.2,750,000/-, in 1991. The loan was secured by a charge over the property L.R. No. 27/263 dated 8th April, 1991. The Plaintiff did eventually develop the charge land by putting up a residential home. Due to default in the repayment of the loan, the Defendant sold the suit property at a price of kshs.5.6 million, in August 1994.

The Plaintiff felt aggrieved by the sale of his property and filed this suit against the Defendant praying for the following orders:

- (a) Kshs.8,150,000.00.**
- (b) Interest on (a) from June 1994 until in full at commercial rates.**
- (c) Costs**
- (d) Any other and further relief as the Honourable Court may deem fit to grant.**

The Plaintiff's complaints are basically two fold.

1. That at the time of the sale the market value of the suit property was Kshs.13,750,000/- and that it was sold at a gross under value. The Plaintiff therefore seeks the difference between the market value and the sale price, which he contends is Kshs.8,150,000.00. For this preposition the Plaintiff relies on the case of **Kenya Commercial Bank vs. James Osebe Court of Appeal Case No. 60 of 1982.**
2. That at the time the suit property was sold, the two parties were engaged in active negotiations to redeem the suit property and that therefore the eventual sale of the suit property by private treaty was fraudulent and was out of collusion between the Defendant and the purchasers.

On the Defendant's part, it has denied that the suit property was sold without notice to the Plaintiff. The Defendant's position is that before the sale, the property was widely advertised and subsequently three auctions were conducted but were not confirmed on falling below the reserve price. The Defendant also denies that the suit property was sold at an under value or that the suit property was valued at

Kshs.13,750,000/- at the time of sale. The Defendant has also denied that any sums are due from it to the Plaintiff besides the sum of kshs.444,687/90 which the Defendant paid to the Plaintiff after sale of the suit property and after deduction of the amount justly due to the Defendant.

The suit was heard interparties with the Plaintiff calling himself as the key witness. The second witness the Plaintiff called was Stephen Macharia Karanja a professional valuer and a director of Bageine, Karanja and Mbuu Valuers. This witness testified that his partner valued the suit property on 12th October, 1994, on instructions of the Plaintiff. He stated that by then, new owners had taken possession and ownership of the property from the Plaintiff and so there was no site visit before the valuation report was made. He produced a valuation report P. exhibit 5, prepared by Mr. P.K. Njuguna, in which the suit property was valued at Kshs.14 million. Mr. Karanja confirmed that, as per the report and as per Mr. P.K. Njuguna's letter D. exhibit 1 dated 1st November, 1999, the valuation was based on a past valuation report by City Valuers and Architectural Drawings. Mr. Karanja also confirmed that for an accurate valuation, a valuer needed to physically visit the property to access its value and also to compare the going price for similar property in the area. Mr. Karanja confirmed that no mention was made in the report that a comparison of suit property with others in the area was carried out.

The Defendant called Michael Sebastian Kibui, a valuer with Ebony Estates Limited, who produced a valuation Report of the suit property by Mr. Francis Kabogo Ndegwa, now deceased. The death certificate of Mr. Ndegwa was a D. exhibit. The Report was pages 14 to 16 of Defendant's exhibits. Mr. Kibui stated what a valuation of a residential house would entail and said it included a physical inspection and assessment of the property. Mr. Kibui testified that it was not possible to arrive at a fair valuation if one did not visit the site. He testified that it was especially necessary to visit the site where one was relying on architectural plans as constructions did not necessarily follow plans. Mr. Kibui dismissed the report by Bageine, Karanja & Mbuu, P. exhibit 5, as not likely to be accurate by virtue of evidence that it was based on architectural plans and past valuation report.

The second witness to testify for the Defendant was James Erick Opondo Obwako, the Defendant's Mortgage Administrator. This witness produced as exhibits and went through correspondences between the Plaintiff and the Defendant and between the Defendant and Auctioneers regarding the suit property. These correspondences demonstrate that the Plaintiff was given notice of the intention to sell the suit property in exercise of statutory power of sale by the Defendant. It shows indulgences given to the Plaintiff by the Defendant on various occasions between March 1993 and January, 1994 on the Plaintiff's request and on proposals he gave that he would pay the debt. The correspondences are evidence of negotiations carried out between the Plaintiff and the Defendant but which yielded no fruits.

The exhibits show various auctions conducted by Kenya Shield Auctioneers, which the Defendant rejected for being below the reserve price on 10th August, 1993, 29th September, 1993 and 23rd March, 1994. The documents also show that the Defendant finally sold the suit property by private treaty around August 1994, when it realized Kshs. 5,500,000/-. The Defendant contends that it gave an account of the proceeds of the sale to the Plaintiff through a letter dated 19th October, 1995. The letter is found at page 40 of the Defendant's exhibits. The letter forwarded to the Plaintiff a cheque for kshs.444,687/90, being surplus realized.

The parties filed a list of agreed issues on 15th June, 1985 in which 11 issues were agreed upon as follows:

1. Was the Defendant entitled to exercise its statutory power of sale?
2. If (1) is in the affirmative, did the Defendant give notice of its intention to exercise its statutory power of sale to the Plaintiff?
3. Was the reserve price of Kshs. 5,500,000.00 an undervaluation of the property?
4. Should the true value of the property be ascertained from valuation reports by valuers or by offers

attracted by offers for sale in the open market?

5. Were there any improvements made by the Purchaser that would affect the value of the property when valuation was carried out on the property?
6. Was the property sold in bad faith and with fraudulent intentions or did the Plaintiff lawfully and properly exercise its statutory power of sale?
7. What then was the actual value of the property at the time of sale?
8. If the value of the suit property is higher than the actual amount sold for, is the Plaintiff entitled to compensation in the difference?
9. Is the Plaintiff estopped from challenging the validity of the sale?
10. Is the Plaintiff entitled to the relief sought?
11. Who should bear the costs of this suit?

The burden of proof is on the Plaintiff to prove his case. There are only two key issues in this matter and I believe that the decision rests on the finding on both. The first one is whether the Defendant's right to exercise its statutory power of sale had accrued and secondly whether the suit property was sold at a gross undervalue and therefore, whether the Plaintiff is entitled to recover the difference between the actual value of the suit property and the sale value.

I have summarized the evidence of the two parties in this case. Even though the Plaintiff tried to impress upon the court that the Defendant denied him an opportunity to redeem his property, and alleged that it was sold without due notice and therefore before the Defendant's right to sell had accrued, I find that there is enormous evidence to show that the Defendant exercised great restraint and gave the Plaintiff great indulgence to redeem the suit property. There is enormous correspondence placed before this court exchanged between the two parties. These correspondences show that between 1993 and 1994, the Plaintiff sought and was given time to redeem the suit property and or regularize payment of the loan. During that entire period, the Plaintiff neither redeemed the suit property nor honour the proposals he gave the Defendant to pay certain amounts of the loan. Even though I agree, as proposed by the Plaintiff, that the two parties were engaged in active negotiations in an attempt by the Plaintiff to redeem the suit property it was the Plaintiff and not the Defendant who dishonoured the terms of their agreements.

The Plaintiff's contention was that the Defendant did not give notice of the intended sales to the Plaintiff. That however cannot be a correct position because there is enormous correspondence between the parties to show not only that the Plaintiff was kept posted of all the attempts made by the Defendant to sell the suit property and realize its security, but that the Plaintiff caused several auctions to be called off at its request upon making proposals to make payment, which he never honored. The Plaintiff cannot be heard to complain that he had no notice of any of the auction sales carried out by the Defendant.

The Plaintiff also complains that he was locked out of the process of redemption by the Defendant because the Defendant negotiated for the sale of the suit property through private treaty. The Plaintiff also complains that the act of selling the suit property by private treaty was unlawful and fraudulent. The particulars of the alleged fraud and collusion by the Defendant are provided under paragraph 9 of the plaint as follows:

9. i) Selling the property at a grossly undervalued price of Kshs.5.6 million when the true market value of the property was in the average sum of Kshs.13,750,000.00

ii) Not advising the Plaintiff when negotiations were going on between the Plaintiff and the Defendant on how the Plaintiff would settle the arrears in his mortgage account. The Defendant knew that the Plaintiff was selling another two of his properties being L.R. No. 27/158, Nairobi and

Nairobi/Block 104/112, on Juja Road, Nairobi with the sole purpose of liquidating the Defendant's mortgage.

iii) Colluding by its officers to disposes the Plaintiff of his property.

I will consider the issue of the sale of the suit property at an under value later in this judgment. For consideration for now I will consider the issue of fraud and collusion. The Plaintiff in his evidence stated that he was actively involved in negotiations in the Defendant Bank to redeem the suit property after selling some of his other properties and paying to the Defendant the sum due to it. The Plaintiff has demonstrated that he was trying to dispose of some properties in order to pay part of the sum owed to the Defendant. In the letter dated 9th of April, 1993 the Plaintiff informed the Defendant that he had requested his advocates to remit to the Defendant the sum of kshs.750,000/= being the proceeds of a sale of a property along Juja road and a further Kshs.300,000/= from the sale of another property. The letter is page 13 of the Defendant's bundle. The Plaintiff's proposals of payment to the Defendant are contained at page 6 and 7 of the Plaintiff's bundle. The truth is the Plaintiff did not honour either of those proposals as result of which the defendant instructed auctioneers to sell the suit property and the first sale took place on the 16th March, 1993. That sale was however not confirmed as the Defendant called it off due to the Plaintiff's proposal to settle the outstanding sum. The Defendant gave the Plaintiff upto 15th of June 1993 to pay the loan arrears. As demonstrated by the Defendant in the exhibited correspondences at pages 11, 12, 17, 18 and 19 of the Defendant's bundle, the Plaintiff did not honour this proposal and the Defendant instructed auctioneers to advertise and sell the properties on 10th of August, 1993. The auction was carried out and the highest bid was Kshs.5 million. The Defendants did not accept the bid because of the reserve price placed on the suit property of Kshs.5.5 million which, the Defendant witness testified, was based on a valuation report of the suit property.

There was a third auction on the 29th September, 1993 which again brought the highest bid of kshs.5 million which the Defendant did not accept. The Defendant has exhibited a letter dated 21st October 1993 which is page 24 of his bundle of exhibits in which it requested the Plaintiff to forward to it a repayment proposal to avoid further attempts to sell the suit property. The plaintiff gave no proposals and that led to the fourth auction on the 23rd of March 1994. The highest bid was Kshs.5.1 million but the bidder subsequently withdrew the bid. It is after this that the Defendant sold the suit property through private treaty around August, 1994.

Under Section 69(1) of the Transfer of Property Act (group 8) It is stipulated as follows:

“69(1) A mortgage, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the court, have power when the mortgage money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some even has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable”

The Plaintiff admitted in his evidence that he was engaged in active negotiations in an attempt to redeem the suit property or repay the outstanding arrears to the Defendant. All the proposals the Plaintiff gave to the Defendant were never honoured. That explains the reasons why the Defendant made attempts to sell the suit property in order to realize the security. The Plaintiff has not adduced any evidence to show that there was any collusion between the Defendant and the purchasers of the suit property, Mr. and Mrs. Patrick Kanyagia. I note that there were quite a number of correspondences

between the Plaintiff and the Defendants regarding the negotiations between the two parties in which sale was by private Treaty raised. In one such letter found at page 37 of the Defendant's bundle, the Defendant wrote to the Plaintiff on the 15th August, 1994 advising the Plaintiff that the Defendants had not received the undertaking referred to in his letter to the Defendant, and advising the Plaintiff that the Defendant had decided to sell the suit property by private treaty in exercise of Statutory Power of Sale. It is very clear that the Defendant did not act in secrecy in the manner in which it attempted to sell the suit property both through public auction and by private treaty. I am not persuaded that there was any fraudulent or unlawfulness in the manner in which the Defendant sold the suit property. Under section 69(1) of the Transfer of Property Act, which is the primary law applicable to the suit property, a mortgagee has power to sell the mortgage property either by public auction or through Private Treaty.

I have also considered the circumstances of the case. The sale by private treaty was the fifth attempt by the Defendant to sell the suit property. That sale helped the Defendant to realize the sum of Kshs.5.5 million. In the previous attempts made to sell the suit property by public auction, the highest offer the Defendant got in those auctions was Kshs.5.1 million. I do not find any evidence of fraud or collusion against the Defendant. The Defendant exercised its rights within the law and also kept the Plaintiff posted of its every move. The Plaintiff cannot be heard to cry foul. The Defendant exercised restraint and indulged the Plaintiff over a long period of time and therefore gave the Plaintiff ample opportunity to pay the arrears due or to redeem the suit property. If there was any party that failed in its obligation in this case I am persuaded that it was the Plaintiff and not the Defendants who failed. The Defendants demonstrated enormous patience and indulged the Plaintiff. Therefore, I do find and hold that the sale of the suit property through private treaty was within the Defendant's statutory right, and was not fraudulent.

The second and final issue for determinations is whether the Defendant sold the suit property at an under value. I have already set out the case by both parties. The onus is on the Plaintiff to prove this claim on a balance of probabilities. In support of his contention that the suit property was sold at an under value, the Plaintiff called one witness, Mr. Karanja. As stated earlier Mr. Karanja produced a valuation report on the suit property carried out by a partner in the firm of Bageine, Karanja and Mbuu Valuers on the 12th October, 1994. The instructions had been given by the Plaintiff to by P. K. Njuguna, a partner in the said firm. The report was P. exhibit 5. In that report Mr. Njuguna valued the suit property and Kshs.14 million. It was indicated that the valuation was based on a past valuation report by City Valuers and also on Architectural Drawings.

The Plaintiff did not call the maker of that report, and neither did he offer any explanations why he was not called as a witness. This was the most important evidence in support of the Plaintiff's contention that the suit property was sold at an under value. Mr. Karanja ought to have been called to produce his report and to substantiate it to the court.

Mr. Ougo for the Defendant has urged the Court to find that the reason why Mr. P. K. Karanja was not called as a witness to produce his report was because his evidence could have been adverse to the Plaintiff's case. Mr. Ougo urged the court to draw an inference from the Plaintiff's failure to call this witness that his evidence could have tended to be adverse to his case. For that proposition, Mr. Ougo relied on the case of **BUKENYA & OTHERS VS UGANDA [1972] EA 549.**

The Defendant on the other hand called a valuer, one Michael Sebastian Kibui, a valuer with Ebony Estates Limited. The witness produced a Valuation Report by one Francis Kabogo Ndegwa, now deceased. The death certificate of Mr. Ndegwa was a Defendant's exhibit. The late Ndegwa valued the suit property at Kshs.5.5 million and his report was dated 9th July, 1993, and is found at pages 14 to 16 of the Defendant's bundle. The Defendant sought to rely on Mr. Ndegwa's report, produced by Mr. Kibui under section 35 of the Evidence Act. The proviso to that section gives an exception to the general rule that the maker of statement shall be called as a witness and the exception provided includes where the maker is dead as in the case of Mr. Ndegwa.

Mr. Kibui, who is a valuer by profession, explained what is comprised in the exercise of valuation of premises. He testified that it included a physical inspection and assessment of the property. Mr. Kibui expressed doubts that it was possible to arrive at a fair valuation if one did not visit the premises valued.

Mr. Karanja for the Plaintiff, even though not wanting to admit, fully agreed that for a fair valuation a valuer should visit the property being valued before making his report.

I considered the evidence adduced by both parties on the issue of valuation. None of the makers of the reports produced in this court testified. Mr. Njuguna was not called as a witness and it was clear that the Plaintiff was not willing to call him. I do make an inference as urged by the Defendant that from the Plaintiff's conduct, the reason why the Plaintiff did not call this person as a witness is because his evidence could have tended to be adverse to his case.

I compared the report by Mr. Karanja with that of the deceased Mr. Ndegwa. There was definitely a big margin of difference in the valuation by these two valuers. Of the two reports, it is only Mr. Ndegwa the deceased, who based his report on a physical inspection of the suit property. The report by Mr. Njugunawas based on a past valuation by third parties and on architectural designs. Both the past valuations and on architectural reports were not produced in court. More importantly however is the clear evidence that the report was based on impressions created by reports and designs of other persons without the benefit of a physical inspection of the premises. I am not persuaded that a report based on imaginations and imagery created from an examination of other peoples work can produce a fair assessment in terms of the construction, dimensions, physical condition and value of the property. Mr. Njuguna's report cannot be accurate neither cannot be a fair assessment or a fair valuation of the suit premises.

Mr. Ashimoshi has urged the court to follow the decision of **Kenya Commercial Bank vs. Osebe**, supra, and find that it was unrealistic for the Bank to see it's only duty as covering the outstanding debt and selling the suit property at an under value. In that case the Court held:

“While the bank had no duty to wait for a rising market it was unrealistic for the bank to see its only duty as covering its own outstanding debt especially as the debt had been reduced by the Respondent.”

Mr. Ougo has urged the court to view the Osebe case in light of its peculiar facts. Mr. Ougo submitted that the Court in that case found the chargee bank had been negligent, careless and reckless: that the court took into account the fact that although the chargee had sold the property for kshs.20,000/=, the auction purchaser had sold it again barely a year later for kshs.180,000/= and that the same chargee lent the subsequent purchaser a sum of kshs.200,000/= on the security of the same property.

I have considered the case cited by the Plaintiff. It is my belief that the case exonerates the Defendant from blame. Having waited to sell the suit property at the accessed value; and having released the surplus sums realized from the sale to the Plaintiff, the Defendant proved that it understood its duty was not just to cover the outstanding debt. It demonstrated that it had the interests of its customer at heart. Having considered the evidence adduced before me I am not satisfied that the Defendant sold the suit property at an under value. The Defendant sold the property for Kshs.5.5 million. It is shown that at the time the Defendant had in it's possession a Valuation Report dated 16th July, 1993 which gave the valuation the value of the property as Kshs. 5.5 million a year before the sale. There is no evidence to show that the Defendant was negligent and was only concerned in recovering it's own outstanding debts. The evidence before the court is contrary. The Plaintiff admitted by the Plaintiff that the Defendant paid to him the sum of Kshs.444,687/90, being the surplus from the sale of the property after the Defendant had recovered the outstanding debt. The Defendant was honest in its dealing and even refunded to the Plaintiff whatever was surplus after realizing its security.

This leads me to the final point raised by the Defendant, that the Plaintiff is overtaken by the rule of estoppel. It is Mr. Ougo's contention that the Plaintiff has received and kept the sum of Kshs.444,687/90 being the surplus realized from the proceeds of the sale of the suit property. Mr. Ougo urged that he cannot be heard to complain that the sale of the property was fraudulent, in bad faith and at a gross under value while he took and continues to enjoy its proceeds. For that proposition, counsel relied on the case of **MILLS VS DUCKWORTH [1938] 1 ALL ER 318**. Mr. Ashitiva did not comment on it. I agree with the general principles enunciated in the cited case.

The circumstances in the instant case and those of the cited case are different. In appropriate circumstances this case could have been considered as relevant to this matter. However I am not prepared to find that the Plaintiff should be precluded from claiming damages for negligence or fraud resulting in the sale of his property at a gross under value on grounds of the doctrine of estoppel. Since I have found the Plaintiff has not been able to prove that there was any fraud or any negligence on the part of the Defendant, or collusion with those who bought the suit property by private treaty and since I did not find the suit property was sold at a gross under value, or at an under value for that matter, I will not go into the principle in the cited case.

In conclusion, I am not satisfied that the Plaintiff has proved his case on a balance of probabilities. Consequently I dismiss the Plaintiff's case with costs to the Defendant.

Dated at Nairobi this 17th day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Court clerk: Nthale

N/A for the Plaintiff

Mr. Ougo for the Defendant

LESIIT, J.

JUDGE