



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 556 of 1998

FLORENCE W. KIRATU (*Suing as the legal Representative of the*

***Estate of ELIUD KIRATU KARUIRU – DECEASED*).....**

PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA.....1ST
DEFENDANT

NELSON NDIRANGU NDEGWA.....2ND
DEFENDANT

LEGACY AUCTIONEERS.....3RD
DEFENDANT

JUDGMENT

This suit was originally filed by Eliud Kiratu Karuiru. The said Eliud Kiratu Karuiru however died before this case could be heard by the court. His wife, Florence W. Kiratu obtained letters of administration in respect of the estate of Eliud Kiratu Karuiru- deceased (*hereinafter referred to as the deceased*) and applied to be substituted as a plaintiff in this suit in the place of the deceased. In her further amended plaint, the plaintiff averred that the deceased charged his property namely; Nakuru Municipality Block 3/683 (*hereinafter referred to as the suit property*) to the 1st defendant as a guarantor to a loan of Ksh.160,000/= which was borrowed by Timothy Ngugi Kiratu. The said Timothy Ngugi Kiratu is a son to the plaintiff. She averred that the said loan was advanced to Timothy Ngugi Kiratu in 1997 and was to be repaid with an interest of 26% per annum. The plaintiff averred that under the said guarantee, the suit property would only be sold in the event that the said Timothy Ngugi Kiratu failed to pay the said sum advanced to him. The plaintiff averred that in April, 1998, the 1st defendant advised the deceased that the suit property would be sold to defray the amount which was then owing of Ksh.808,608/=. The plaintiff averred that the deceased paid to the 1st defendant a total sum of Ksh.395,000/= in part payment of the said accrued debt. She stated that the 1st defendant returned the cheque of Ksh.300,000/= and informed the deceased that it had sold the suit property in a public auction in its bid to recover the amount owed and which the suit property had been pledged as a security.

The plaintiff averred that although the deceased was notified that the suit property would be sold by public auction on the 28th October 1998, and although the said property was advertised

for sale, the said public auction did not actually take place. The plaintiff pleaded that the purported sale of the suit property to the 2nd defendant by the 3rd defendant was therefore illegal as no public auction took place on the said 28th October 1998. The plaintiff pleaded the particulars of fraud and false presentation by the defendants. She stated, *inter alia*, that the defendants had purported to have sold the suit property in a public auction when such public auction in actual fact did not take place. The plaintiff further averred that the entire process under which the said sale was undertaken was tainted with irregularity and illegality. She averred that the terms of the sales by public auction were not adhered to by the defendants.

The plaintiff therefore averred that the purported transfer of the suit land by the 1st defendant to the 2nd defendant was unlawful, null and void. She therefore prayed for this court to declare the said sale of the suit property to be a nullity. She further prayed for a perpetual injunction to restrain the defendants from interfering with the plaintiff's quiet enjoyment of the suit land. The plaintiff further prayed for an order of this court to compel the defendants to submit themselves to have the account in respect of the deceased's indebtedness taken. In the alternative, the plaintiff prayed that she be awarded general damages for illegal and/or fraudulent sale and transfer of the said suit property.

Each of the three defendants filed separate defences to the plaintiff's claim. The 1st defendant averred that it exercised its statutory power of sale of the suit property after the deceased had defaulted in repaying the loan plus interest which loan had been advanced on the strength of the security of the suit property. The 1st defendant averred that it charged interest in respect of the said loan in accordance with the then prevailing market rates. The 1st defendant averred that it gave instructions for the sale of the suit property and exercised its statutory power of sale lawfully and properly. The 1st defendant denied that it had exercised the said statutory power of sale fraudulently or by making false presentations. The 1st defendant urged this court to dismiss the plaintiff's suit with costs.

On his part, the 2nd defendant filed a defence and a counter-claim. The 2nd defendant averred that he had purchased the suit land in a public auction which was lawfully conducted by the 3rd defendant. The 2nd defendant averred that he complied with all the conditions that were put in place to enable the said public auction to be considered lawful. He averred that he paid the purchase consideration in full after which the 1st defendant transferred the suit property to him in exercise of its statutory powers of sale by chargee. The 2nd defendant denied the averments by the plaintiff that the said sale by public auction was tainted by fraud and false presentations. He averred that he was the legal owner of the suit property and should therefore be granted possession of the same. The 2nd defendant urged this court to dismiss the plaintiff's suit with costs and grant his prayers in the counter claim. In the said counter claim, the 2nd defendant prayed for an order of eviction of the plaintiff from the suit property. He further prayed for an order of permanent injunction to restrain the plaintiff and the members of her family from interfering with his quiet possession of the suit property. He prayed to be awarded costs of the counter claim.

The 3rd defendant filed an amended defence. It denied that it had conducted the said sale by public auction contrary to the established rules. The 3rd defendant averred that it complied with all the conditions necessary for a successful sale by public auction to be conducted. It averred that it had sold the suit property to the 2nd defendant after the 2nd defendant was declared to be the highest bidder. The 3rd defendant averred that the allegations made by the plaintiff in her plaint were unfounded and vexatious. The 3rd defendant urged this court to dismiss the plaintiff's suit with costs.

At the hearing of the suit, the plaintiff called two witnesses in support of her case. The said two witnesses were PW1 Loice Wambui Kiratu the daughter of the plaintiff and PW2 Joseph M.

Inoti, a registered valuer. It was the plaintiff's case that the suit property was charged by the deceased to the 1st defendant as a guarantee to a loan which was borrowed from the 1st defendant by one of the deceased's son called Timothy Kiratu. PW1 testified that the deceased had earlier purchased the suit property from the 2nd defendant. She testified that the deceased charged the said property to secure a loan of Ksh.160,000/= which was borrowed by the said Timothy Kiratu. PW1 conceded that although the deceased made effort to pay off the said debt after the said Timothy Kiratu had defaulted in repaying back the loan in December 1997, the 1st defendant issued a demand letter to the deceased demanding the payment of the amount that was then due. PW1 produced four demand letters as *plaintiff exhibits No.3-6* written to the deceased by the 1st defendant.

PW1 recalled that the 1st defendant issued a statutory notice to the deceased indicating that it would sell the suit property by public auction on the 28th October 1998. PW1 testified that she saw hand bills which were circulated in Nakuru Town by the 3rd defendant advertising the said property for sale, a copy of bill was produced as *plaintiff's exhibit No.8*. It was the plaintiff's case that the said hand bills, including a notice which was later published in the newspapers indicated that the sale of the suit property by public auction would be conducted outside National Bank of Kenya Nakuru with effect from 11.30 a.m. PW1 testified that she went to the venue of the sale with her mother and stood at the venue from 10.00 a.m. to 2.00 p.m. She recalled that during the said period no public auction took place. She later went to the offices of Sheth & Wathigo Advocates, who were the advocates of the 1st defendant and informed them no sale by public auction had been conducted. She testified that it was on the basis of this information that the said firm of Sheth & Wathigo accepted the payment of the sum of Ksh.300,000/= from the deceased in part payment of the debt owed to the 1st defendant. PW1 testified that she was shocked when the said cheque was returned by the said firm of Sheth & Wathigo Advocates who informed them that the suit property had already been sold to a third party in a public auction.

PW1 reiterated that no such sale by public auction took place on the 28th October 1998. PW1 produced a copy of a cheque dated the 30th October 1998 which was paid by the firm of Mungai Mbugua & Company Advocates to the firm of Sheth & Wathigo Advocates on behalf of the 2nd defendant. She testified that the said cheque of Ksh.325,000/= which was produced as *plaintiff's exhibit No.11* was paid two days after the date which the said public auction had been scheduled to be conducted. She testified that the said payment was therefore made in contravention of the strict conditions of sale by public auction. PW1 further testified that contrary to the condition of sale put in place by the 3rd defendant, the balance of the purchase consideration was not paid within 30 days of the said purported sale by public auction. PW1 produced the said conditions of sale as *plaintiff's exhibit No.12*.

PW1 testified that the 1st defendant executed the documents transferring the suit property to the 2nd defendant more than three months after the said purported sale by public auction. PW1 produced copies of the transfer by chargee in exercise of power of sale as *plaintiff's exhibit No.16*. She further testified that the 2nd defendant was still paying part of the purchase consideration as late as 19th December 1998. She produced a copy of the said receipt as *plaintiff's exhibit No.15*. She also produced a copy of the receipt which the 2nd defendant paid a stamp duty when he transferred the suit property to his name as *plaintiff's exhibit No.17*. The said receipt is dated the 19th February 1999.

It was further the plaintiff's case that the conduct of the defendants was consistent with the averments made by the plaintiff in her plaint to the effect that there was actually no sale by public auction which had taken place on the 28th October 1998. PW1 testified that the suit property was fraudulently transferred to the 2nd defendant after the said sale by public auction had been stage managed. It was further the plaintiff's case that the circumstances under which

the 2nd defendant paid the purchase consideration for the suit land was consistent with the averment that the said sale was actually a private treaty and not a sale by public auction as provided by the law. PW1 reiterated that she was present at the venue of the said sale by public auction in the company of his mother. She reiterated that the deceased was not at the venue of the sale by public auction because at the material time he was unwell. The plaintiff urged this court to grant her prayers as pleaded in the plaint together with costs of the suit.

PW2 Joseph M. Inoti testified that he was instructed on the 26th February 2005 by the plaintiff to value the suit property for the purpose of determining its current market value. PW2 testified that after viewing the suit property he arrived at the open market value of the suit property at Ksh.2,800,000/=. He however conceded that the said value was not based on the cost of construction of the buildings within the said suit property. He further conceded that he had not been informed of the improvements that could have been made on the suit property between the year 1998 and the year 2005 when he was instructed by the plaintiff to value the said suit property. The said valuation report was produced as *plaintiff's exhibit No.14*.

After the close of the plaintiff's case, the 1st defendant closed its case without offering any evidence. The 2nd defendant called two witnesses. He testified as DW1. His witness was DW2 Kamau Kimani. The 3rd defendant Benjamin Kisoil Sila t/a Legacy Auctioneers also testified in support of his case. It was the defendants' case that the entire process of sale of the suit property by public auction from the time the 3rd defendant was instructed by the 1st defendant to the time the 2nd defendant paid the purchase consideration in full was regular and lawful. The 3rd defendant testified that he had received instructions from the 1st defendant through their advocates Messrs Sheth & Wathigo Advocates on the 1st September 1998 to sell the suit property in a public auction. He testified that after receiving the said instructions, he issued a notification of sale to the deceased.

The 3rd defendant advertised the suit property for sale. The said advertisement appeared in the Daily Nation newspaper of the 15th October 1998. A copy of the said newspaper was produced as *3rd defendant's exhibit No.1*. He testified that the said sale was scheduled to take place on the 28th October 1998 outside National Bank of Kenya, Nakuru. He testified that on the material day, he went to the scheduled site and conducted the said sale by public auction. He recalled that several people bid but the successful bid was by the 2nd defendant who offered to pay the sum of Ksh.1,300,000/=. He however testified that he could not confirm the said sale because the reserve price fixed by the bank was Ksh.1,500,000/=. He recalled that after the said auction, he consulted with the advocates of the 1st defendant who confirmed to him that he could proceed with the said sale at the sum offered by the 2nd defendant.

The 3rd defendant recalled that the 2nd defendant did not bid in person though he was present during the auction. He recalled that a Mr. Francis Kamau bid on behalf of the 2nd defendant who was said to be trading as Ndonge Investments. The 3rd defendant denied the allegation by the plaintiff that no public auction had actually taken place on the material day. The 3rd defendant testified that after he had declared the 2nd defendant's bid to be successful, he signed a memorandum of sale with the 2nd defendant and which he produced as *3rd defendant's exhibit No.3*. The 3rd defendant testified that the said sale was by public auction and not by private treaty. He further reiterated that the 2nd defendant complied with the conditions of sales set down by the said public auction.

The 3rd defendant however conceded that the 2nd defendant did not strictly comply with the conditions of sale of the public auction by the fact that he had failed to immediately pay the deposit of Ksh.325,000/= being 25% of the purchase consideration after the fall of the hammer. He however explained that the reason why the 2nd defendant paid the said deposit after two

days was because he was awaiting confirmation from the 1st defendant whether he could accept the offer made by the 2nd defendant which was below the reserve price. The 3rd defendant further conceded that after he had executed the memorandum of sale with the 2nd defendant, he left the issue of the payment of the balance of the purchase consideration to the 2nd defendant and the advocates of the 1st defendant. He reiterated that although the said sale of the suit property to the 2nd defendant was not strictly in accordance with the conditions of sale that he had advertised, there were no grounds sufficient to impeach the said sale by public auction which was conducted in accordance with the law.

The 2nd defendant testified that the suit property used to belong to him before he sold it to the deceased. In 1997, he saw an advertisement that the said property would be sold by public auction. He testified that he went to the public auction venue on the 28th October 1998 and bid for the suit property. He recalled that several people offered their bids but ultimately he was declared to be the successful bidder at about 12.15 p.m. when he offered the sum of Ksh.1,300,000/=. He confirmed that he did not pay the sum of Ksh.325,000/= being 25% of the bid price at the venue because his money was being held at the time by Messer. Mbugua Advocate.

The 2nd defendant testified that he told the 3rd defendant that the said sum would be paid by his said advocates. He recalled that the said amount was paid by his said advocates. He however contradicted the testimony of the 3rd defendant when he failed to mention the fact that he had been told by the 3rd defendant that the said sale would be subject to confirmation by the 1st defendant as it was below the reserve price. He further conceded that he did not pay the balance of the purchase consideration within thirty days as per the conditions of sale by public auction which he signed once he had paid the deposit of Ksh.325,000/=. He further conceded that he had paid the said balance of the purchase consideration beyond the thirty days stipulated in the conditions of sale by public auction advertised by the 3rd defendant. The 2nd defendant reiterated that he was the one who bid during the public auction. He denied ever having instructed one Mr. Francis Kamau to bid on his behalf during the public auction as stated by the 3rd defendant.

The 2nd defendant disowned an affidavit that he had sworn on the 6th April 1999 in which he had deponed that he had instructed Francis Kamau of Ndonge Investment to bid on his behalf. The said replying affidavit was produced as *2nd defendant's exhibit No.2*. The 2nd defendant reiterated that he had complied with the requirements of the said sale by public auction and urged this court not to impeach his title in respect of the suit property. He testified that he had not seen PW1 at the auction venue on the 28th October 1998 when he purchased the said suit property in the public auction.

The 2nd defendant's witness DW2 Kamau Kimani testified that on the 28th October 1998 he was instructed by the 2nd defendant to bid on his behalf at the public auction which was held outside National Bank of Kenya at Nakuru. He recalled that at that time, the 2nd defendant had a cold and could not speak. He testified that the auction took place between 1.30 p.m. and 2.30 p.m. He recalled that he successfully bid on behalf of the 2nd defendant when he offered the bid price of Ksh.1,300,000/=. He testified that the 2nd defendant was declared to be the successful bidder by the 3rd defendant. DW2 however denied that he was the Francis Kamau of Ndonge Investments who was referred to in the testimony of the 3rd defendant. He further insisted that he was the one who paid the initial deposit of Ksh.325,000/= after the fall of the hammer. He testified that the balance of the purchase consideration was paid to the advocates of the 1st defendant by Mungai Mbugua Advocate. He reiterated that he was the one who bid during public auction and not the 2nd defendant who at the time had a cold. That was the evidence that was offered by the defendants.

I have read the pleadings filed by the parties in support of their respective cases in this suit. I have carefully considered the evidence that was adduced by the parties to this suit. I have further considered the written submissions filed by the parties to this suit after the conclusion of the hearing of the suit. The issues for determination by this court are as follows;

- (i) *Whether the 1st defendant was justified in exercising its powers of sale by chargee in respect of the suit property.*
- (ii) *Whether there was a public auction which was conducted on the 28th October 1998 by the 3rd defendant.*
- (iii) *Whether the law as regard the sale by public auction was complied with by the 3rd defendant when the 3rd defendant was alleged to have conducted the sale on the 28th October 1998.*
- (iv) *What appropriate remedies should issue in respect of the matters in dispute placed before this court for its determination?*

From the evidence adduced in this court, there is no dispute that the deceased charged the suit property i.e. Nakuru Municipality Block 3/682 to the 1st defendant when he guaranteed the loan which was advanced to his son Timothy Ngugi Kiratu. It is further not disputed that the said Timothy Ngugi Kiratu defaulted in repaying the loan advanced to him. The 1st defendant issued a statutory notice to the deceased to pay the said amount owing or else it would realise the security charged to it (i.e the suit property). From the testimony of PW1, it is apparent that the deceased made an effort to pay part of the said sum which was then owed to the 1st defendant. Unfortunately, the amount which the deceased paid was such that it could not persuade the 1st defendant to put off the sale of the suit property by public auction. The 1st defendant, through its advocates Messrs Sheth & Wathigo Advocates, instructed the 3rd defendant to sell the suit property by public auction.

I have evaluated the evidence adduced in this case and I am satisfied that the 1st defendant complied with the requirements of the law that required it to issue a statutory notice to the deceased before the suit land could be offered for sale in a public auction. PW1 the daughter of the deceased admitted that the statutory notice was issued to the deceased by the 1st defendant through its advocates. When the 3rd defendant received the instructions from the 1st defendant to sell the suit property by public auction, the 3rd defendant issued the requisite notice to the deceased that he would sell the suit property by public auction if the deceased did not pay the amount then owing to the 1st defendant. PW1 confirmed that the deceased was served with the said notification of sale by the 3rd defendant.

The sale of the suit property was schedule to take place on the 28th October 1998 from 11.30 a.m. outside National Bank of Kenya Nakuru. The 3rd defendant did advertise the said sale in the Daily Nation newspaper of the 15th October 1998. In the said notice, the 3rd defendant notified the members of the public that the conditions of sale would be as follows;

“1 All intending purchasers are requested to view and verify the details for these are not warranted by the auctioneers or our clients.

2. A deposit of 25 per cent must be paid by cash or banker's cheque at the fall of the hammer and the balance to be paid to the chargees' advocates within a period of 30 days from the date of sale.

3. The sale is subject to a reserve price.”

According to the 3rd defendant, he did conduct the said sale by public auction on the 28th October 1998. However on the evidence adduced in this case, it is clear that no such sale by public auction did in fact take place. PW1 testified that she was at the venue of the public auction from 10.00 a.m. to 2.00 p.m. in the company of the plaintiff. She recalled that no public auction actually took place. I observed her demeanour when she testified before court and I am satisfied that PW1 told the court the truth when she stated that no public auction actually took place.

Her evidence was to a larger extent corroborated by the contradictory and incredible evidence that was adduced by the 2nd and the 3rd defendants. Whereas the 2nd defendant insisted that he was the one who bid for the said suit property during the public auction, the 3rd defendant on his part testified that one Francis Kamau of Ndonge Investments bid on behalf of the 2nd defendant. DW2 Kamau Kimani denied that he was the Francis Kamau referred to by the 3rd defendant in his testimony. He testified that on the material day, he was requested by the 2nd defendant to accompany him to the venue where the public auction was to be held. He testified that on that day, the 2nd defendant had a cold and could not speak. He recalled that he was the one who bid on behalf of the 2nd defendant and thereafter paid the 25% deposit of the purchase consideration of Ksh.1,300,000/= at the fall of the hammer.

The 3rd defendant contradicted the 2nd defendant and DW2 when he testified that upon the conclusion of the auction, he told the 2nd defendant that his offer of Ksh.1,300,000/= for the suit property would not be immediately accepted because it was below the reserve price. The 3rd defendant testified that after the said auction, he sought further instructions from Messrs. Sheth & Wathigo Advocates on whether the offer by the 2nd defendant, which was below the reserve price, would be accepted. It is upon receiving confirmation of the acceptance of the offer by the 1st defendant that the 3rd defendant accepted the bid by the 2nd defendant. The 2nd defendant however in his testimony testified that after the said sale by public auction, his offer was immediately accepted by the 3rd defendant and in fact he executed the memorandum of sale confirming that the said property had been sold to him on the material day.

Having carefully evaluated the contradictory evidence adduced by the 2nd and 3rd defendants, it is clear to this court that the said evidence was contrived or made up in a bid by the said defendants to dupe this court that a sale by public auction did take place when in actual fact no such sale took place. It is inconceivable that the three defence witnesses could each be so certain that three different people bid for the same property on behalf of the 2nd defendant. It is clear that the sale of the suit property by the 3rd defendant to the 2nd defendant was by private treaty and not by public auction. The 2nd defendant paid the said deposit of Ksh.325,000/= two days i.e. on 30th October 1998, after the said public auction. The 3rd defendant conceded that he did not strictly comply with the conditions of sale that he had represented to the public when he offered the said property for sale by public auction. It is clear to this court that if this court were to accept that a public auction did indeed take place on the material day, then the said sale would still be vitiated by the fact that the 3rd defendant did not strictly comply with the conditions of sale which had been put in place by statute. **Section 21 of the Auctioneers Act** requires an auctioneer to comply with certain conditions before a sale by public auction can be said to be valid. In the present case, it is clear that the 3rd defendant threw the Rule book out of the window when he purported to conduct the said sale by public auction.

It was further evident to this court that the manner in which the 2nd defendant paid the purchase consideration to the 1st defendant was in clear breach of the conditions of sale by public auction. It was evident from the testimony of PW1 that the 2nd defendant continued paying the balance of the purchase consideration more than three months after the said purported sale by public auction. In the circumstances of this case, I do hold that the plaintiff

established on a balance of probabilities that no sale by public auction did in fact take place on the 28th October 1998. The suit property was sold to the 2nd defendant by private treaty. The contradictory and incredible evidence adduced by the 2nd and 3rd defendants clearly confirms that no such sale by public auction took place.

This court having found that there was no sale by public auction on the said date, what is the remedy that is available to the plaintiff? According to **Section 77(3) of the Registered Land Act**,

“A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

Section 77(1) of the Registered Land Act requires a chargee when exercising his power of sale to act in good faith. Similarly, the auctioneers Act and the rules made there under require an auctioneer when conducting a sale by public auction to similarly act in good faith. In the present case, it is clear that the 3rd defendant breached the law when he purported to sell the suit property by public auction. The 3rd defendant acted under the instructions of the 1st defendant. The 1st defendant shall therefore be vicariously liable for the said breach of the law by the 3rd defendant.

The plaintiff sought an order of this court to have the suit property be re-transferred to her. However, it is clear that **Section 77(3) of the Registered Land Act** does not allow a transfer of a property which has been made by a chargee to be impeached. The remedy available to the plaintiff is that of damages. I do therefore hold that the plaintiff established to the required standard of proof on a balance of probabilities that she suffered damage as a result of the wrongful exercise of the power of sale by chargee by the 1st defendant which resulted in the deceased losing the suit property. I will therefore allow the alternative prayer sought by the plaintiff that she should be paid damages.

I therefore hold that the general damages that shall be paid by the 1st defendant for the unlawful exercise of the power of sale by chargee shall be Ksh.1,500,000/= which I have arrived at after deducting the amount that the suit property was sold to the 2nd defendant and the current value of the suit property as assessed by PW2. The plaintiff shall have the costs of the suit. I will not grant the prayers sought by the 2nd defendant in his counter-claim because this court did earlier give an order that possession of the suit premises be handed over to the 2nd defendant. For the avoidance of doubt, I do declare that the 2nd defendant is the lawful owner of the suit property. I will make no orders as to costs on the counter-claim. The 1st defendant shall pay the costs of the suit to the plaintiff.

DATED at NAKURU this 29th day of June, 2007

L. KIMARU

JUDGE