



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 424 OF 1995

WESTON MAINA MURUITHIA.....PLAINTIFF/RESPONDENT

VERSUS

**INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION.....1ST DEFENDANT**

E.T. KANYORI t/a REDLON AUCTIONEERS.....2ND DEFENDANT

FREDRICK MAHINDA NGUNJIRI.....3RD DEFENDANT

JUDGMENT

The plaintiff **WESTON MAINA MURUITHIA**, sued the 3 defendants who are, the ICDC, the 1st defendant, E.T Kanyoru the auctioneer, the 2nd defendant, and one Fredrick Ngunjiri Mahinda, registered as the proprietor of the suit premises.

The suit is in respect of the suit premises which the plaintiff claimed he bought at an auction sale and paid for through a bankers cheque, but never had the same transferred to him, and instead he discovered that it was now registered in the name of the 2nd defendant, the original owner.

In the suit, the plaintiff prayed for specific performance of the contract of sale between the plaintiff, on one part, the 1st and 2nd defendants on the other hand, in respect of the suit premises.

The plaintiff also prayed for an order “directing the 1st defendant to execute and furnish the plaintiff with a transfer by charge in favour of the plaintiff transferring to the plaintiff the suit premises free of any encumbrances or in the alternative, the Deputy Registrar of this court do execute the said transfer in place of the 1st defendant.

The ICDC, the 1st defendant denied the plaintiff’s claim and stated in its defence that it never received the total auction proceeds (if any), and hence was under no obligation in law to execute the transfer.

Its further defence was that the auction was “not conducted in public”, and was tainted with illegality and the plaintiff filed a reply to the 1st defendant’s defence, and termed it, an afterthought an attempt to cover up the 1st defendant’s wrongful and or arbitrary act to execute and release to the plaintiff a transfer

of the suit land. The court records show that hearing dates were taken in the registry by both advocates of the plaintiff and the 1st defendant.

On the day of the hearing, both the advocate for the plaintiff and the one for the 1st defendant were present in court. Mr. Kinyanjui, counsel for the 1st defendant sought an adjournment of an application for withdrawal filed on behalf of the 3rd defendant. I refused to grant adjournment, when I found from the records that the application he referred to had been filed and was pending in the court file for about 2 years. The delay in prosecuting it was inexcusable, in my view, so I decided to proceed with the hearing. The application was filed by Messrs S. Thuo Muhia & Co. Advocates who had taken a date by consent in the registry, together with counsel for the plaintiff. It was not clear to me why counsel for the 1st defendant was asking for adjournment on behalf of the counsel for the 3rd defendant. Anyway I refused to adjourn the case and proceeded with the hearing of the case which began with the evidence of the plaintiff who testified that he sued the ICDC because he bought a farm they were selling through an auctioneer at an auction sale, which was held on 8.7.94 in Kibigoti trading centre in Kirinyaga. The farm was No. KIINE/KIBIGOTI/1123.

That before the sale, there were posters all over on the walls, trees, houses, advertising the sale of the farm. The plaintiff went to the auction, desirous of buying the farm, which was sold (auctioned) at Kshs.175,465/=.

The plaintiff was the highest bidder. He paid the cheque of Kshs.175,465/= from his KCB account in karatina. He was given a receipt by the auctioneer whom he accompanied to his office. That the auctioneer wanted an additional sum of Kshs.15,146/=.

He identified the receipt issued to him for the price of the farm, Kshs.175,468/80. Later he paid the auctioneers charges amounting to Kshs.15,146/= on 11.7.94.

It came out during this trial that there was a criminal case against the auctioneer. Most of the documents were produced at that trial, so most of the exhibits produced at this trial were copies of the originals as the plaintiff served a notice to produce on counsel for the ICDC, the 1st defendant who did not respond to the notice.

The auctioneer, who is the 2nd defendant said after the auction that he would send the original document to the ICDC. The plaintiff received a letter from the auctioneer dated 8.7.94 confirming that he was the highest bidder at the auction. He also received a copy of a letter written by the auctioneers to ICDC, informing them how the auction was conducted.

The plaintiff also referred to a letter written by the auctioneer on 7.9.94 to the Deputy Corporation Secretary of ICDC forwarding a cheque No. 009499.

The plaintiff said this was not the cheque he had written to the auctioneer of Kshs.175,000/=. The auctioneer went to the ICDC and was surprised to learn that they had not received any money.

The ICDC wrote to the auctioneer telling him that they had not received the purchase price. The letter was copied to the plaintiff. On receipt of it, the plaintiff reported the matter to his advocate at the time and from then on, there was an exchange of letters between the plaintiff's lawyer and the ICDC's lawyers.

Finally the auctioneer was arrested and charged and the plaintiff was summoned to give evidence in a Magistrate's court, Criminal Case No. 4299 of 1994. The auctioneer was charged and convicted of theft by servant.

The plaintiff searched the title of the farm and found that it was in the name of Fredrick Ngunjiri Mahinda and it has an injunction order to stop any transfer. The plaintiff said the farm belongs to him as he paid for it as witnessed by so many people.

The plaintiff was asked many questions to which he answered that the cheque he paid to the auctioneer was a banker's cheque. He answered further that he believed the auctioneer was the agent of ICDC. He had no reason to believe otherwise. The plaintiff even paid the auctioneer's charges.

The plaintiff called a witness Simon Mbaria Njeru, from Kirinyaga. He is a neighbour of the plaintiff. He also knows the auctioneer E.T. Kanyori, trading as Redlion Auctioneers. The witness confirmed that there were advertisements for the sale of a farm in Kibingoti town by the Red Lion auctioneer belonging to Kanyori.

Simon encouraged the plaintiff to buy a banker's cheque, which he did of Kshs.175,000/=. He too wanted to buy the farm, but he did not have enough money. Simon confirmed that the plaintiff was the highest bidder and added another Kshs.15,000/= being auctioneer's charges. The auctioneer then gave the plaintiff a letter to take to ICDC.

The 1st defendant, the ICDC, was represented at the hearing by Grace Mudola Magunga, a Senior Legal Officer, since 3.5.99. She deals with instructions to auctioneers.

Grace confirmed that ICDC instructed Red Lion to proceed to sell the farm in question in this case, but ICDC never heard of the auctioneer except vide a letter confirming that he had auctioned the farm yet he did not forward the proceeds of sale to ICDC.

Grace confirmed that ICDC did not get the attendance schedule from the auctioneer. Even their branch manager who normally must attend a scheduled auction did not forward any report neither did he forward the 25% deposit paid at the fall of the hammer.

Grace stated further that the way the auctioneer behaved was not "**procedural**".

That further the ICDC did not get a memo of sale signed by both the auctioneer and the highest bidder, stipulating the conditions of sale.

Grace identified the 2 receipts. These were receipt Nos 118 for Kshs.175,465/80 paid to Red Lion auctioneers by the plaintiff and another of Kshs.15,146/= again paid to the auctioneer by the plaintiff. She confirmed that ICDC did not receive any of this money paid to the auctioneer by the plaintiff. Looking at receipt No. 118 for Kshs.175,465/80, Grace said that the date appearing on it seemed tampered with, from 7 to 8, making the receipt appear as if it was issued before the auction.

That ICDC felt aggrieved by what the auctioneer did, so it reported the matter to CID in Nairobi, and the D.C Kerugoya.

Grace confirmed that the owner of the property redeemed the property and the same was discharged. She confirmed that the ICDC is not holding the property any more as the owner redeemed it. She also confirmed that an injunction order to stop any transfer was registered on the title on 22.2.95, after discharge of the title to the owner of the land.

On questioning, Grace confirmed that ICDC gave instructions to Red Lion auctioneers to sell this property and by then Mahinda had not redeemed the property.

Grace answered further that ICDC did not know what happened from the date it gave instructions to Red Lion auctioneers to sell the property. That the auctioneers gave ICDC a cheque which bounced, cheque No. 50134 for Kshs.175,000/=.

She also recalled that the auctioneer wrote to ICDC on 8.7.94 to say that the auction had taken place, but this was contrary to procedure, that is why the ICDC complained and reported the matter to the CID. Concerning the cheque of kshs.175,000/= paid by the auctioneer, which cheque subsequently bounced, even this, he said was paid irregularly because it did not pass through the legal department as it should have.

According to Grace, the procedure followed in such cases is that the ICDC gives instructions to auctioneers to sell, and further that upon the fall of the hammer, and after confirmation by the branch officer of ICDC on sight, that a reserve price has been met, the purchase price is paid to the auctioneer leaving the balance to be paid after 30 days to ICDC, not the auctioneer.

Grace also said that ICDC rescinded the sale when the auctioneer's cheque bounced, and there were other circumstances too.

In re-examination, Grace clarified that the statutory notice of sale the ICDC gave runs for 3 months, and the redemption period remains open until the fall of the hammer.

Counsel for the plaintiff and the 1st defendant consented to prepare written submissions which were handed to court and now form part of the record of this case.

The plaintiff submits through his advocate that the auction sale did not indeed take place as watched by him and his witness and the auctioneer's act of sending a cheque to ICDC, which cheque bounced was a testimony that indeed there was an auction. That further, the fact that ICDC complained to the CID who subsequently arrested and charged the auctioneer who was convicted of theft by servant showed that the auctioneer was an agent of ICDC.

Further the submissions were on the point that the plaintiff because the successful bidder of the property at the fall of the hammer which in effect extinguished owner's right of redemption.

On liability, the plaintiff's advocate relied on 2 decided cases **GIKUBU MBUTHIA vs JIMBA CREDIT & ANOTHER** and **RUSSEL COMPANY LTD vs COMMERCIAL BANK OF AFRICA LTD**.

These 2 cases are on the point that "property and all interests in the suit property passes to the plaintiff at the fall of the auctioneer's hammer. The point urged is on the equity of redemption which is extinguished at the fall of the hammer.

The advocate urged the court to order that the 1st defendant is liable in putting the plaintiff in such an awkward position, so the court should order specific performance of the contract by the 1st defendant.

Counsel for the 1st defendant, on the other hand, submitted that no valid auction took place, and the whole situation was staged managed by the plaintiff and the auctioneer.

That the plaintiff had a bankers draft of Kshs.175,464/80 before the auction, thus showing that, "**the plaintiff knew, talked and agreed with the auctioneer before the alleged auction on exactly what was to be done**".

The 1st defendant's counsel submitted further that a scrutiny of the bank draft purportedly issued by Kenya Commercial Bank Ltd purporting to be a transfer of Kshs.175,465/- from the plaintiff to the auctioneer is undated, and further, it is a bank draft as opposed to a cheque as stated by the plaintiff in his evidence. That the bank draft was made payable directly to the auctioneer's account, and most likely before the alleged auction.

The submissions of the 1st defendant's counsel stated further that the plaintiff's counsel was served with a "**Notice to Produce**" in the form of bank statements from the plaintiff's account from which the "cheque" issued to the auctioneer was reflected, but this request was not replied to by counsel for the plaintiff.

This led counsel for the 1st defendant to submit that there was no "proof" tendered to show that the plaintiff paid the auctioneer Kshs.175,465/80, at the fall of the hammer.

There was further evidence by the plaintiff that he paid the auctioneer Kshs.15,146/=, not on the day of the auction, but a few days later on 11th July 1994.

Counsel for the 1st defendant wondered why he paid this money, when all he was required to pay according to Grace Mudola Magunga of ICDC was 25% of the purchase price at the fall of the hammer, and 75% must be paid after 30 days.

Counsel for the 1st defendant also queried whether the auctioneer ever advertised the property for sale, and again, whether the owner of the land was served with a notification of sale!

When I considered the oral evidence of the plaintiff and his witness, alongside the evidence of Grace Magunga, a senior counsel with the ICDC, the 1st defendant, I came to the conclusion that there were “serious irregularities” in the manner in which the alleged auction was conducted by the second defendant.

My second conclusion was that the plaintiff did to a large extent, know or was party to some of the irregularities.

I make the 2 conclusions above because of several factors which came out in evidence, such evidence as the price at which the property was sold. The plaintiff seems to have known it before the auction, or better still, the price seems to have been “fixed” by the plaintiff and the auctioneer because the plaintiff said in his evidence that he paid “**a cheque of 175,465/= drawn on Kenya Commercial Bank Karatina**”.

I have searched through the court file, but failed to find any cheque. What I found was a document on what “appears to be letter heads of”, Kenya Commercial Bank, and is headed “TRANSFER/DRAFT” payable to KCB Kerugoya for the Credit of RED LION AUCTIONEERS. This document is however, UNDATED.

I am unable to find from this document, that it transferred the sum of Kshs.175,465/80, from the plaintiff’s account to that of RED LION AUCTIONEERS.

I find that in the circumstances of this case, further evidence was needed to show the transfer of funds from the plaintiff to the auctioneer. A notice to produce bank statements, served by the 1st defendant’s counsel, to the plaintiff’s counsel, which notice was not replied to, was not necessary in this case.

The logical question also is, how did the plaintiff know the exact price of the land before the fall of the hammer, to enable him to carry the exact amount required, though in my view, he did not carry any money by cheque or otherwise?

The “**fixing of the deal**” between the auctioneer and the plaintiff, came in the issuance of what was considered as Receipt Nos. 161 and 118 showing that auctioneers charges was paid for, Kshs.15,146/= on 11.7.94, and “**purchase price**”, of Kshs.175,465/80, paid on 8.07.94 to the auctioneer. Here I do agree with the submissions of counsel for the 1st defendant that the date “8” was tampered with. It looks like an original 1 or 7, made to read 8.

It is these irregularities that made ICDC report this matter to the CID police. That led to the arrest and prosecution of the auctioneer, on charges of theft by servant. He was found guilty, convicted and sentenced to a term of imprisonment.

The auctioneer did not ‘defend’ this civil suit, though documents were served on him.

The ICDC did admit having commissioned the auctioneer to auction the suit premises, but Grace said he never got back to them to say what he was doing, neither did he contact their agent in Kerugoya who would have been present at the auction.

What they got from him was a letter dated 8.7.94 to say that he had conducted the auction. The 4th paragraph of that letter reads, “**the highest bidder for the property was Mr. Weston Maina Muruithia for Kshs.175,000/= . He paid the required deposit the same which will be posted to you in due course under a different cover note.....**”

This letter begs the question, what then was the purchase price, because the auctioneer seemed to have considered the alleged sum of Kshs.175,000/= as deposit, yet the plaintiff told court that he paid for the land in full by a banker’s cheque.

Worthy of note on this point is the evidence of the plaintiff’s witness Simon Mbaria Njeru who told the court, he was present at the auction. He said,

“I cautioned the plaintiff to buy a bankers cheque. I know he bought one for Kshs.175,000/=”.

I find that this evidence further shows the plaintiff’s complicity in this matter. How was the price of the land known even by his witness before the auction was conducted to warrant the plaintiff to have a “cheque”, as he called it, of the exact amount?

Evidence shows that the auctioneer sent a cheque to the ICDC of about Kshs.175,000/= which cheque bounced.

I am satisfied from the evidence I have analysed in great detail that no proper auction took place, or if it did, then the same was “**riddled with serious flaws**”, which made it no auction, in my view, and the plaintiff was aware of it.

Further, the ICDC did not receive the money for which the land was allegedly auctioned, and an attempt to regularize the position by the auctioneer ended in disaster as his cheque to ICDC bounced!

Given these circumstances, the ICDC were entitled to allow the owner of the land to redeem the mortgage, which he did, and his documents of title were released to him by ICDC.

Finally, I find that the plaintiff has failed to prove the case against either the ICDC, who is the 1st defendant or the owner of the land, sued as the 3rd defendant and I must dismiss the plaintiff’s case with costs to ICDC, who is the 1st defendant.

Dated at Nairobi this 25th day of October 2007.

JOYCE ALUOCH

JUDGE