



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 328 of 2004

DAVID MOSE BICHANGA.....PLAINTIFF

VERSUS

SAVINGS & LOAN KENYA LTD.....1ST DEFENDANT

JACQUINE OSORO T/A VIGILANT AUCTIONEERS2ND DEFENDANT

PETER MAINA NJUGUNA.....3RD DEFENDANT

JUDGMENT

By a plaint filed on 9th December, 2004, the plaintiff stated that he was registered as a lessee of a property known as Nakuru/Municipality Block 3/1079 hereinafter referred to as “*the suit property*”. He had charged the suit property to the first defendant to secure a loan which had been advanced to him. He claimed that the first and second defendants fraudulently disposed of the suit property to the third defendant by purporting to have sold the same by public auction on 11th March, 2004. He contended that there was no such auction on the said date or at all. He set out the following particulars of fraud:-

“(a) *By pretending that there was a public auction on the 11th March, 2004 or thereabout when in the real sense there was no such auction at the place and time.*

(b) *By colluding and conspiring to defraud the plaintiff of his property.*

(c) *By colluding and conspiring and fraudulently pretending to sell the suit property at a throw away price without due care of the interests of the plaintiff.*

(d) *By not appreciating or taking into account the current prevailing market price.*

(e) *Selling the suit property below the reserve price.*

(f) *By transferring the suit property secretly to the 3rd defendant to avoid the attention of the plaintiff.”*

He sought a declaration that the alleged auction was illegal, null and void and cancellation of the purported transfer of the suit property to the third defendant. He also prayed for an injunction to restrain

the defendants, their agents and/or servants from interfering with his possession and occupation of the suit property.

The first defendant stated in his statement of defence that the plaintiff charged the suit property to itself to secure repayment of a sum of Kshs.560,000/- plus interest but he failed to service the said loan and as at October 2003 the outstanding balance was in excess of Kshs.2,000,000/-. As a result, the plaintiff exercised its statutory right of sale of the charged property and had it sold by public auction on 11th March, 2004. The auction was conducted by the second defendant and the third defendant was declared the highest bidder. The third defendant paid the full purchase price and the suit property was duly transferred to him. The first defendant denied that there was any fraud whatsoever in the said sale.

The first defendant added that the plaintiff had, between 1999 and 2000, filed four different suits trying to stop it from realizing the security. He was unsuccessful in all those suits. The plaintiff had perjured himself by stating that he had no other suit pending in court and that there had been no previous proceedings in any court between him and the defendants over the suit property.

In his defence, the second defendant stated that he lawfully conducted a sale of the suit property by way of public auction on 11th May, 2004. He denied that there was any collusion, conspiracy and/or fraud as alleged by the plaintiff.

On his part, the third defendant stated that he attended the said auction and bid for the suit property. He was the highest bidder at Kshs.1,000,000/- which he paid and the property was lawfully transferred to him. He also denied all the particulars of fraud attributed to him by the plaintiff.

By way of a counter claim, the third defendant stated that upon registration of the transfer of the suit property in his favour, he requested the plaintiff to give him vacant possession of the same but he refused. He prayed for a declaration that he was the lawful owner thereof and that the plaintiff was a trespasser, an eviction order against the plaintiff, mesne profits and damages.

During the hearing, the plaintiff testified that in October, 1994, he charged the suit property for Kshs.560,000/- and by March, 2004 he had repaid nearly Kshs.700,000/-. According to him, he had repaid the loan fully. In early 2004, he saw an advertisement in a local newspaper indicating that his property was going to be sold by public auction on 11th March, 2004. On the material day, he went to the place where the auction was scheduled to be held but nobody showed up. Thereafter he went to make enquires at the second defendant's office. He was allegedly informed that there had been no auction. He further stated that the same information was given to him by the first defendant's officers when he visited their offices.

However, sometimes in October, 2004 he was surprised when somebody went to his house at the suit property and informed him that the property had been sold. He decided to go and conduct a search at Nakuru Land registry and he confirmed that the property had actually been sold and transferred to the third defendant.

In cross examination, the plaintiff admitted that he had previously filed several suits seeking to restrain the first defendant from selling the suit property. He further admitted that although he had known about the auction well in advance, he did not take any action to stop the same if indeed he believed that he had repaid the loan in full.

The plaintiff's wife, **Joyce Munyangi Mose, PW2**, corroborated the plaintiff's evidence substantially, and so did **Joseph Nyangaresi, PW3**, who testified that he went to the advertised venue of the auction, outside National Bank of Kenya, Nakuru, together with the plaintiff and his wife but the auction did not take place.

Bruce Kiplangat Chemweno, DW1, testified on behalf of the first defendant. He produced the charge that was executed by the plaintiff (D.Exh.1) and stated that as at March, 2004, the plaintiff's loan balance stood at Kshs.2,047,248.50. The plaintiff had frustrated the chargee's efforts to realize the security by

filing several suits whenever the property was scheduled for sale by public auction. He produced copies of several complaints that had been filed by the plaintiff. The witness further testified that prior to the sale of the suit property, the first defendant caused it to be valued and its market value was given as Kshs.1,600,000/-. The forced sale value was stated as Kshs.1,100,000/- and the reserve price was given as Kshs.980,000/-. It was duly advertised for sale and the auction went on as scheduled. The third defendant was declared as the highest bidder at Kshs.1,000,000/-. DW1 attended the auction as a representative of the chargee. The third defendant paid the full purchase price and a transfer by chargee was signed on 8th June, 2004. It was registered on 21st June, 2004.

Elikana Patasi, DW2, was in the employment of the second defendant (who is now deceased) and he testified as to how the auction was conducted on the material day.

The third defendant, **DW3**, testified that he saw an advertisement in respect of the suit property in the "**DAILY NATION**" newspaper of 23rd February, 2004. The auction was to take place outside the National Bank Building, Nakuru, at 11.30 a.m. He went there and participated in the auction which was attended by several other people. He was declared the highest bidder at Kshs.1,000,000/-. He paid the full purchase price and eventually the suit property was transferred to him.

Thereafter a letter was written to the plaintiff who was still in occupation of a residential house on the suit property requiring him to vacate the same. The plaintiff was also required to pay mesne profits at the rate of Kshs.12,000/- per month from 11th March, 2004. The sum of Kshs.12,000/- was the average monthly rent for similar houses in that locality. The plaintiff refused to vacate or pay the mesne profits. The said letter was served upon the plaintiff on 12th October, 2004 and he filed this suit on 9th December, 2004. It is evident that the plaintiff moved to court because he feared that he was going to be evicted out of the house.

From the evidence on record, it is clear that the plaintiff charged the suit property to the first defendant to secure repayment of a sum of Kshs.560,000/- plus interest but he failed to repay the same. Although the plaintiff alleged that he had repaid the loan in full, he was unable to produce any evidence to that effect. The first defendant was therefore perfectly entitled to take steps towards realization of its security. The plaintiff was well aware of his default and that is why he severally frustrated the chargee's efforts of selling the suit property. If the plaintiff had repaid his loan in full as alleged, he would not just sit down and wait to see his property being sold in a public auction, having known about the scheduled auction well in advance.

Regarding the auction, I believe that the same was lawfully held. DW1, DW2 and DW3 gave clear evidence as to how the same was conducted. They were cross examined very thoroughly by the plaintiff's counsel but their evidence remained consistent. I am satisfied that the third defendant lawfully purchased the suit property, having been declared the highest bidder. It is trite law that a sale by public auction becomes absolute upon fall of the hammer and thereafter the chargor's right of redemption is lost, see *Captaqin Patrick Kanyangia Vs Savings & Loan & 2 Others*, Civil Appeal No. 150 of 1993 at Nairobi (unreported).

The plaintiff miserably failed to prove his case and I must dismiss the same with costs, which I hereby do. On the other hand, the third defendant is the absolute and indefeasible proprietor of the leasehold interest comprised in the suit property. The plaintiff refused to give him vacant possession, even after he confirmed that the third defendant had purchased the same. In *Wamwea Vs Catholic Diocese of Muranga Registered Trustees [2003] KLR 389* it was held that a party who refuses to give vacant possession after service of notice becomes a trespasser. The plaintiff is therefore a trespasser to the suit premises. He should vacate forthwith, failing which the third defendant shall be at liberty to evict him. The plaintiff should also pay mesne profits at the rate of Kshs.12,000/- per month from November, 2004 since notice was served upon him on 12th October, 2004. The plaintiff will also pay the costs of the suit together with interest thereon as well as interest on the mesne profits.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2007.

D. MUSINGA

JUDGE

Judgment delivered in open court N/A for the plaintiff, in the presence of Mr. Murimi for the 1st defendant and N/A for the 2nd defendant.

D. MUSINGA

JUDGE