



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 198 of 1992

SHADRACK CHEPKWONY KILEGES.....PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

PIUS KIPKEMEI KOECH.....2ND DEFENDANT

HARON OPUKA ODINA.....3RD DEFENDANT

JUDGMENT

The plaintiff personally filed this suit on 1st April, 1992. He stated that he was the registered owner of a parcel of land known as **NAKURU/OLENGURUONE/AMALO/216** hereinafter referred to as “*the suit premises*”.

Sometimes in March, 1981, the plaintiff was advanced a development loan of Kshs.61,000/- by the first defendant. The same was to be repaid over a period of seven years together with interest of 10% per annum and the annual repayment sum was to be Kshs.10,886.45 upto September 1989.

The plaintiff stated that he was unable to repay the loan instalments that were due in 1982 and 1983 but on 20th December, 1983 he went to the first defendant’s Molo branch with a cash sum of Kshs.5000/- with an intention of making part payment but the Branch Manager refused to accept the same and on the same day he travelled to Nairobi and went to the first defendant’s head office and saw the Financial Controller who referred him back to their Molo branch. The plaintiff stated that the Branch Manager once again refused to accept that sum and he went away and started making effort to get more money so as to repay the loan. However, the plaintiff said that shortly thereafter, he saw an advertisement in a newspaper that the suit property was to be sold by public auction on 10th April, 1994 at the District Officer’s office, Molo. The plaintiff further averred that he went to the aforesaid venue of the auction on the date as advertised but no auction was conducted. He said that sometimes in October, 1984 he was informed by one of the members of Olenguruone Land Control Board that the first defendant had caused the suit premises to be transferred to it with an intention of selling the same.

The plaintiff further stated that on 10th May 1985 he was informed by the second defendant who was also his neighbour and the area chief that he had bought the suit premises and required him to vacate therefrom failing which he would be evicted. The plaintiff alleged that the second and the third defendants unlawfully processed consent to transfer the suit premises. He urged the court to order cancellation of the title deed for the suit premises which had been issued in favour of the second defendant and order that the same be registered in his name. He further prayed that he be given time to arrange for payment of any money that was due to the first defendant.

The first defendant filed its statement of defence and denied the plaintiff's claim insofar as it related to it but admitted that it had realised the security that had been pledged to it and that had been done in strict accordance with the law. It urged the court to strike out the plaintiff's suit as it was an abuse of the court process, did not disclose any cause of action and it consisted of an admission of breach of mortgage terms.

In his statement of defence, the second defendant stated that the first defendant transferred the suit premises to him for valuable consideration and denied that the transfer was fraudulent and therefore he was the registered absolute proprietor of the suit premises.

The third defendant stated in his defence that he was the chairman of the Olenguruone Division Land Control Board and at the material time, the first defendant applied for consent to transfer the suit premises to the second defendant and the board granted the same. It added that the first defendant had exercised its statutory power of sale of the suit premises by public auction and therefore the issue of consent by the Divisional Land Control Board was a formality because the provisions of the **Land Control Act** only applies to voluntary transactions.

The plaintiff filed an amended plaint on 15th November, 1993 and stated *inter alia* that the first defendant's action of refusing to accept the sum of Kshs.5000/- as part payment amounted to putting a clog or fetter on his statutory right to redeem the mortgaged property. He further alleged that the purported sale of the suit premises by the first defendant to the second defendant was fraudulent and stated the particulars of negligence as follows:-

- (a) That there was no notification of sale.
- (b) That there was no public auction conducted.
- (c) That the property was grossly undervalued.
- (d) That no account was rendered to him.
- (e) That he was not allowed to participate in the public auction, if any.
- (f) That he was not allowed to witness or nominate somebody to bid for him.
- (g) That no consent from the area Land Control Board was obtained.

The plaintiff further alleged that later on he paid to the first defendant Kshs.74,660/- being the entire amount that was due and payable. He urged the court to make a declaration that the transfer of the suit premises to the second defendant was null and void and a further declaration that the said mortgaged property had been redeemed.

On the other hand, the second defendant also filed an amended defence and counter claim and sought an eviction order against the plaintiff, general damages for trespass and a permanent injunction to restrain the plaintiff from trespassing or interfering with his enjoyment of the suit premises.

The first defendant, in its amended statement of defence denied having put any clog or fetter on the plaintiff's right of redemption and stated that sale of the suit premises was advertised and held on 10th April, 1984 when it bid and purchased the land and registered it in its name and later sold and transferred the same to the second defendant.

In his testimony before the court, the plaintiff admitted that he saw an advertisement in a newspaper indicating that his land was to be sold by public auction on 10th April, 1984 but when he went to the advertised venue of the auction on the aforesaid date, nothing took place. However, during cross examination he conceded that the auction was advertised to take place at the District Officer's office at Molo, but he went to Molo post office. He later learnt that the first defendant sold the suit premises to the

second defendant for Kshs.120,000/-, saying that its value was Kshs.400,000/- as it was measuring 16½ acres. Shortly after the date of auction he received a statement from the first defendant dated 30th October, 1984 claiming Kshs.35,538.70. On 14th May, 1992 the plaintiff paid to the first defendant Kshs.30,000/- and on 12th August 1992 he paid a further sum of Kshs.44,660/- making a total of Kshs.74,660/-. However, at the time of filing this suit he had not paid any money. The above payments were accepted without prejudice.

PW4, Zacharia Nyamari Keana was the secretary to the Land Control Board, Nakuru in 1984 and also used to serve as the secretary to Olenguruone Land Control Board. He testified that on 27th September, 1984 Olenguruone Land Control Board gave its consent for transfer of the suit premises from the plaintiff to the first defendant at a consideration of Kshs.85,000/-. The witness said that he was not aware of any consent that was granted by the said Board to transfer the suit premises from the first defendant to the second defendant. He added that in transfers arising from a public auction, the mortgagor was not required to attend a board meeting before a consent to transfer could be issued.

The first defendant called as a witness, **Mr. Mwaura Gitau**, an Auctioneer who was trading as Lake Nakuru Auctioneers. He confirmed that he was instructed by the first defendant to advertise the sale of the suit premises by public auction on 10th April, 1984 at 11.00 a.m. at the District Officer's office, Molo. He conducted the auction on the aforesaid date and time in the presence of Mr. Ndolo, who was the first defendant's Branch Manager at Molo. The first defendant bid for the property and acquired it for Kshs.85,000/- as the other bids received were very low.

The first defendant's loan officer at its Molo branch **Mr. Sospeter Ruwa** told the court that the first defendant sent to the plaintiff an arrears notice dated 1st September, 1983, the plaintiff having defaulted in payment of two yearly instalments. When he failed to pay, a foreclosure notice of payment within 14 days dated 9th December, 1983 was sent to him. The notice was produced as Exhibit 2. The plaintiff said that the letter was hand delivered to him. It required him to pay the full loan amount and the accrued interest, all amounting to Kshs.74,660.06. He was warned that if he did not pay the said sum by the 23rd December, 1983 steps would be taken to realise the security held by the first defendant. The plaintiff responded by writing to the first defendant on 20th December, 1983 and proposed to pay Kshs.5000/- per month but the first defendant rejected that proposal. The witness then said that on 14th March, 1984 it issued a statutory notice, a copy whereof was produced as D. Exhibit 11. The same was not hand delivered as P. Exhibit 2. The said letter was as follows:-

“AGRICULTURAL FINANCE CORPORATION

Development House

Moi Avenue

P. O. Box 30367

NAIROBI

14TH March, 1984

OUR REF. NO. 190187990

Mr. Shadrack C.A. Kilenges

P. O. OLENGURUONE

Dear Sir,

RE: SALE BY PUBLIC AUCTION – L.R. NO. NAKURU/OLENGURUONE/AMALO/216

Enclosed herewith please find a copy of Statutory Notice of sale which will be published in the Kenya Gazette and the Kenya Times on Friday 16th March 1984 from which you will note that your farm will be sold by public auction on 10th April, 1984 at 11.00 a.m. at the office of the District Officer, Molo by LAKE NAKURU AUCTIONEERS.

Yours faithfully,

C.A. ORARO (MRS)

FOR: GENERAL MANAGER

c.c.

The Branch Manager

A.F.C.

MOLO

The enclosed statutory notice contained a list of about five (5) different properties including the suit premises which were all scheduled to be sold on the date and venue as aforesaid. The witness further stated that the plaintiff did not respond to the said notice and so the sale was advertised in the “**KENYA TIMES**” Newspaper of 16th March, 1984 and the first defendant purchased it for Kshs.85,000/-.

On his part, the second defendant said that when he became aware that the first defendant was desirous of selling the suit premises, having purchased the same in the public auction he applied to purchase it, just like other interested purchasers did but since his offer of Kshs.120,000/- was the highest, the same was accepted. Later he got the suit property transferred to him, having applied and obtained a Land Control Board Consent. He denied that there was any fraud in acquisition of the same.

The third defendant confirmed that on 27th September, 1984 he chaired a Land Control Board meeting at Olunguruone and a consent was given to transfer the suit premises from the plaintiff to the first defendant. The plaintiff was not in that meeting and his attendance was not necessary as the first defendant had already sold the property by public auction in exercise of its statutory power of sale, the third defendant stated. He further stated that on 14th November, 1985 he chaired another Land Control Board meeting wherein consent was given to transfer the suit premises from the first defendant to the second defendant. He denied that there was any fraud in the issuance of the said consents. He admitted that he was arrested and charged in Criminal Case No. 2284 of 1990 in connection with the said consents after the plaintiff lodged a complaint against him and the second defendant but the case was subsequently withdrawn under **Section 87(a) of the Criminal Procedure Code.**

From the foregoing, it is not in dispute that sometimes in March, 1981 the plaintiff obtained from the first defendant a loan of Kshs.61,000/- and the same was secured by a charge on the suit premises. The plaintiff was supposed to repay the said loan together with interest by yearly instalments of Kshs.10,886.45 upto September 1989.

It is also not in dispute that the plaintiff defaulted in his loan repayment in 1982 and 1983. Upto September 1984 when the first defendant wrote to the plaintiff demanding full payment of the loan balance together with interest, the plaintiff had not paid anything. Thereafter he offered to pay Kshs.5,000/- but the same was not accepted. Thereafter the property was sold by public auction and was

purchased by the first defendant who later sold and transferred the same to the second defendant. The plaintiff then filed this suit in a bid to get back the suit premises.

The advocates for the parties did not file a list of agreed issues and in my view, the following are the main issues that require this court's determination:-

- (1) Whether the plaintiff was served with an appropriate statutory notice of sale.
- (2) Whether the sale by public auction was held and the plaintiff's mortgaged property duly sold.
- (3) Whether the first defendant purchased the property during the auction and if so, whether that was proper in law.
- (4) Whether consent of Olenguruone Land Control Board was necessary for the suit premises to be transferred from the plaintiff to the first defendant.
- (5) Whether the first defendant lawfully sold the suit premises to the second defendant.
- (6) Whether the first defendant obtained the appropriate Land Control Board's consent for sale and transfer of the suit property to the second defendant.
- (7) Whether the second defendant is the lawful registered owner of the suit property.
- (8) Whether there was any fraud on the part of the defendants or any of them in carrying out the various transactions relating to sale and transfer of the suit premises.
- (9) Whether the payment of Kshs.74,660/- by the plaintiff to the first defendant long after the alleged auction of the suit premises entitles him to the property.
- (10) Who is rightly entitled to the suit premises?

In considering the first issue above, that is, whether the plaintiff was served with an appropriate notice of sale, it has to be pointed out that the postal address that the first defendant had in its records was rather vague, it was simply "**P.O. Olenguruone**". There was no specific post office box that was rented by the plaintiff. It appears to have been a communal post office delivery point and that may explain why the letter of 9/12/83 that demanded payment of the total outstanding sum was hand delivered to the plaintiff. The plaintiff denied having received the statutory notice of sale dated 14th March, 1984. Mr. Sospeter Ruwa, the first defendant's loan officer at its Molo branch said that the notice was sent. It appears that it was sent by post. In my view, that was not proper. Given the nature of the plaintiff's postal address, the notice of sale should have been personally delivered to the plaintiff as had been done with regard to the earlier letter of 9/12/83. There was no proof that the plaintiff ever received it. Although **Section 33 (1)** of the **Agricultural Finance Corporation Act** Cap 323 Laws of Kenya stipulates that such a notice may be served personally or by post, prudence required that in view of the nature of the plaintiff's postal address, the same be served personally. Although the plaintiff saw the advertisement of the sale in the newspaper, he saw it on the actual date of the auction. I therefore hold that the plaintiff was not served with an appropriate notice of sale as required under Section 33(1) of the aforesaid Act.

Regarding the sale of the suit premises, there was sufficient evidence that the same was done by public auction on 10/4/84 outside the District Officer's office at Molo. The plaintiff missed it because he was outside Molo post office where he believed the auction was to be held. During the auction, the bids that were received were rather low and so the first defendant decided to bid for it and was declared the highest bidder at Kshs.85,000/-. That was in line with Section 33(2) of the Act which provides as follows:-

"At a public auction held in pursuance of subsection (1), the corporation, by its agents duly authorised in writing, may bid for and purchase the whole or any part of the land offered for sale".

However, that sale was vitiated by the fact that no appropriate notice of sale had been given to the mortgagor as earlier stated. But for the aforesaid shortcoming, the sale was otherwise proper and the first defendant had every right to sell the same to the second defendant and did not require any consent of Olenguruone Land Control Board to acquire the suit premises from the plaintiff since the acquisition was through a public auction occasioned by exercise of a mortgagee's statutory power of sale. However, having purchased the suit premises, it required such consent to sell and transfer the same to the second defendant. There was evidence that the said Land Control Board lawfully granted the two consents.

As to whether the first defendant acquired proper title to the suit premises having purchased the same in a public auction as was submitted by Mr. Odongo, it is trite law that a mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it as was held by the Court of Appeal in **CAPTAIN PATRICK KANYAGIA & ANOTHER VERSUS DAMARIS WANGECHI & SAVINGS & LOAN KENYA LTD** Civil Appeal No. 150 of 1993. However, if there was no proper service of the statutory notice of sale, a valid sale cannot be said to have taken place and therefore the mortgagor's right of redemption could not have been extinguished in the circumstances. The auction was flawed and the first defendant did not acquire a good title to the suit premises and could not therefore pass a good title to the second defendant.

Although I have held that there was no proper service of notice of sale upon the plaintiff as required, I do not think that the plaintiff proved any of the particulars of fraud which he listed down in his plaint. According to the Longman Dictionary of Contemporary English, "**Fraud**" means "**deceitful behaviour for the purposes of making money**". The plaintiff however proved that the suit premises were sold in the absence of an appropriate notice having been served upon him. The first defendant may have posted the notice of sale but there was no proof that the same was received by the plaintiff. It was not right for the first defendant to allow the auction to go in such circumstances.

Section 143(1) of the Registered Land Act provides as follows:-

"Subject to sub-section (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."

I find that the registration of the first defendant as the proprietor of the suit premises was wrongful and/or was done by mistake and likewise the subsequent title that was acquired by the second defendant cannot be held to be indefeasible. The register should therefore be rectified to restore the name of the plaintiff as the proprietor of the suit premises.

Regarding the sum of Kshs.74,660/- which the plaintiff paid to the first defendant in 1992, if the notice of sale had been served upon the plaintiff, the auction would have been unchallengeable because the mortgagor's right of redemption would have been extinguished at the fall of the hammer. However, at the time when the plaintiff effected the said payment, though long after the purported sale and transfer of the suit property, his right of redemption was still subsisting. He may not have paid the full principal sum and interest since the amount paid was as demanded by the first defendant in December 1983 before the auction. He is therefore liable to pay such balance as may be rightly payable as per the first defendant's advice upon which he will be entitled to be registered as the proprietor of the suit premises in place of the second defendant.

In conclusion, I declare that the transfer of the suit premises to the second defendant was null and void. The second defendant should be refunded by the first defendant the purchase price that he paid inclusive of interest. The plaintiff should, as above stated, pay to the first defendant the interest on the sum of Kshs.74,660/- from 9th December, 1983 to 1992 when he paid the said amount. Thereafter the register of the suit premises should be rectified to bear the plaintiff's name as the proprietor of the suit premises. The second defendant's counter claim is dismissed with costs. The first defendant shall bear the plaintiff's costs of this suit as well as those of the second and third defendants.

DATED, SIGNED AND DELIVERED at Nakuru this 31st day of January, 2006.

D. MUSINGA

JUDGE

31/1/2006