



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

**Civil Case 138 of 2002**

**WILFRED AGAGE NYAWANGA.....1<sup>ST</sup> PLAINTIFF**

**JANE BOSIBORI MAINYE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ALICE NYAWIRA NDUNGU.....DEFENDANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED.....1<sup>ST</sup> THIRD PARTY**

**LEGACY AUCTIONEERING SERVICES.....2<sup>ND</sup> THIRD PARTY**

**JUDGMENT**

The plaintiffs filed suit against the defendant seeking the order of this court to have the defendant evicted from parcel no. Nakuru Municipality/Block 7/105 (*hereinafter referred to as the suit land*). The plaintiffs claimed to have purchased the said parcel of land in a public auction. The plaintiffs further prayed for this court to award them *mesne* profit. The defendant filed a defence. She denied that the plaintiffs had legally purchased the suit land in a public auction. She averred that the plaintiff had colluded with third parties, namely National Bank of Kenya Limited and Msrs Legacy Auctioneering Services to defraud her of her said parcel of land. She counterclaimed against the plaintiffs seeking to have the transfer of the said parcel of land to the plaintiffs revoked. She further prayed that the said parcel of land be re-registered in her name. When the third parties were served by the defendant, they duly entered appearance. They denied that they had colluded with the plaintiffs to defraud the defendant. They averred that the suit parcel of land was sold by the bank pursuant to its statutory power of sale as a chargee after the defendant had defaulted in repaying the loan that was advanced to her. Issues having been settled, this case was fixed for hearing.

At the hearing of the case, the plaintiffs called two witnesses. PW1 Wilfred Nyawanga (*the 1<sup>st</sup> plaintiff*) testified that on the 19<sup>th</sup> of December 2001 he read an advertisement in the Daily Nation by Legacy Auctioneering Services to the effect that a residential property in London area of Nakuru would be sold in public auction on the 18<sup>th</sup> of January 2002 (*advertisement produced as plaintiffs' exhibit No. 1*) PW1 became interested. He went and viewed the house from the outside. On the 18<sup>th</sup> of January 2002, he attended a public auction which was conducted by Legacy Auctioneers outside the National Bank of Kenya, Nakuru. He bid for the property and was declared to be the highest bidder. His bid of Kshs 850,000/= was accepted. He paid a deposit of Kshs 220,000/= at the fall of the hammer. He was issued with a memorandum of sale and a certificate of sale (*produced as plaintiffs' exhibit No. 2 & 3*

respectively). He paid the balance of Kshs 630,000/= on the 4<sup>th</sup> of February 2002 (*copies of the bankers' cheques paid produced as plaintiffs' exhibit No. 4 (a) & (b)*). The bank acknowledged receipt of the said payment and later issued the 1<sup>st</sup> plaintiff with a discharge of charge (*produced as plaintiffs' exhibit No. 5 & 6 respectively*). The bank then transferred the suit land to the plaintiffs by executing a transfer by chargee in exercise of power of sale (*produced as plaintiffs' exhibit No. 7*). The 1<sup>st</sup> plaintiff took the said transfer to the Land office, Nakuru where the plaintiffs were duly registered as the owners of the suit land (*certificate of lease produced as plaintiffs' exhibit No. 8*).

After the plaintiffs were registered as the owners of the suit land, they went into the parcel of land and met with the defendant. The defendant requested them to give her time to vacate from the said suit land. According to the 1<sup>st</sup> plaintiff, the defendant did not vacate the suit land when the time she had requested expired. Instead, the defendant chased away the plaintiffs when they sought to take possession of the suit property hence the decision by the plaintiffs to file this suit. The 1<sup>st</sup> plaintiff testified that the defendant did not vacate from the suit property until June 2004 when he learnt that the defendant had vacated from the suit premises. When he visited the house on the suit land, he realised that the same had been vandalised.

The 1<sup>st</sup> plaintiff denied the averments by the defendant that he had colluded with the bank and the auctioneer to defraud the defendant of the suit property. He reiterated that he had purchased the said property in a public auction which was lawfully held. He denied that he had purchased the said property by a private treaty. He testified that since the defendant had vacated from the suit land, the plaintiff should be paid the rent that they could have benefited from in the period that the defendant was in unlawful possession of the suit land. He testified that he would have been paid monthly rent of Kshs 10,000/=. He testified that he had acquired good title to the suit land. He further testified that although the memorandum of sale appeared in the name of the 2<sup>nd</sup> plaintiff, his wife, after the purchase of the property they made a decision to have the suit property registered in their joint names. He reiterated that the defendant had refused to give them possession when they sought vacant possession and had become violent hence the decision by the plaintiff to file suit.

PW2 Jane Bosibori Mainye (*the 2<sup>nd</sup> plaintiff*) corroborated the evidence of the 1<sup>st</sup> plaintiff in so far as it concerned the circumstances under which the suit property was purchased in public auction. She reiterated that the defendant became violent when they sought to take possession of the suit land. She testified that although the defendant had agreed in writing to vacate from the suit land, when the time came for the defendant to give vacant possession, she reneged on her promise. It was only in July 2004 that the 2<sup>nd</sup> plaintiff learnt that the defendant had vacated from the suit property. When the 2<sup>nd</sup> plaintiff visited the suit property, she discovered that the house had been vandalised. The doors had been damaged and all the locks of the doors had been removed. The cisterns had been damaged and generally the house was in a state of disrepair. She estimated that it would cost them Kshs 30,000/= to restore the house to a habitable state. She reiterated that she was the one who bid for the suit property during the public auction. She urged this court to allow the prayers sought in the plaint. The plaintiffs then closed their case.

The defendant called one witness, herself. She testified that she had borrowed a sum of Kshs 100,000/= from National Bank of Kenya Limited, the 1<sup>st</sup> third party in this case in 1989. She conceded that at the time the property was advertised for sale, the loan had accrued to the sum of Kshs 3 million. The last statement that was sent to her indicated that the loan had accrued to the sum of Kshs 3.5 million. Although she denied that she had been served with the notice of sale, when the said notice was shown to her on cross-examination, she admitted that she had been served with the requisite statutory notice. She further admitted that she had seen the advertisement in the Newspaper which had been placed by Msrs Legacy Auctioneers indicating that they would sell the suit property in a public auction. She however denied that a public auction took place on the 18<sup>th</sup> of January 2002.

Although at the time she was sick, the defendant stated that her husband attended the site of the public auction and confirmed that no public auction had actually taken place. She testified that the suit property

was therefore sold to the plaintiffs in a private treaty because no public auction was held. She denied that the forced sale value of the suit property was Kshs 850,000/=. She reiterated that the suit property had been sold at a price which was lower than the stated market value of Kshs 1.410 million. She conceded that she had been served with the requisite statutory notices before the suit property was sold. She however reiterated that the sale and the transfer of the suit property was irregular and fraudulent because the established procedures had not been followed before the said sale was effected.

The defendant denied that she had voluntarily vacated from the suit property. She testified that she was evicted from the suit property on the 21<sup>st</sup> of May 2004 by people whom she presumed were hired by the bank. She denied that she had chased the plaintiffs when they paid a visit to her house after the purported sale of the suit property. She testified that when she learnt that the bank intended to sell the suit property, she made an effort to secure a buyer but was unsuccessful. She reiterated that the suit property was fraudulently sold by private treaty and not in a public auction. She testified that the plaintiffs colluded with the third parties to defraud her of her property. She prayed that her counterclaim be allowed. The defendant then closed her case. After the defendant testified, she did not participate further in the proceedings in spite of being served to attend court during the dates that the hearing of the case was scheduled.

The evidence of the third parties was therefore taken in the absence of the defendant. Richard Rotich, the officer in charge of advances and recoveries at National Bank of Kenya testified that the records of the bank disclosed that the defendant applied for a loan of Kshs 100,000/= from the bank on the 26<sup>th</sup> of August 1989. She offered a security being parcel number *Nakuru Municipality Block 7/105*. The said loan was approved and disbursed to the defendant. The said security was charged to the bank. The defendant however failed to repay the loan within the agreed period. Although the defendant made proposals on how the said loan was to be repaid, she failed to honour her promise. The bank therefore had no alternative but to seek to realise the security.

He testified that the bank made the first attempt to sell the suit property in a public auction on the 24<sup>th</sup> of April 1996 but the auction did not attract any bidders. On 13<sup>th</sup> of November 2001, the bank instructed Legacy Auctioneers to sell the suit property in a public auction. After the statutory notices were issued, and the property advertised for sale, the suit property was sold in a public auction which was held on the 18<sup>th</sup> of January 2002. He testified that the plaintiffs' bid of the sum of Kshs 850,000/= was accepted by the bank and the plaintiffs paid the said bid sum in full. He denied the allegations by the defendant that no public auction had actually taken place. He testified that the public auction took place outside National Bank of Kenya Nakuru Branch as indicated in the advertisement. He testified that all the procedures established by the law were followed during the said sale by public auction. The transfer of the suit property to the plaintiffs was therefore legal. He urged this court to award the bank damages.

Benjamin Kisoil Sila, the second third party, testified that he was a licenced auctioneer practicing under the name Legacy Auctioneering Services Ltd. He testified that he was instructed by the bank to sell the suit property in a public auction. He recalled that after receiving the instructions he visited the property to familiarise himself with its particulars after which he issued the statutory notice to the defendant. He testified that the defendant acknowledged receipt of the notice. He later advertised the said property for sale in the Daily Nation. On the 18<sup>th</sup> of January 2002, he conducted a sale by public auction outside National Bank of Kenya Nakuru Branch. There were several bidders. The plaintiffs emerged as the successful bidders when they bid for the sum of Kshs 850,000/=. Their bid was accepted by the bank after which they paid the said bid sum in full. He denied that he had irregularly conducted the said sale by public auction. He testified that he had followed all the laid down procedures before selling the said property in a public auction. He urged this court to dismiss the counterclaim by the defendant with costs.

After the close of the case, the plaintiffs and the third parties filed written submissions in support of their respective cases. The issue for determination by this court is whether the sale of the suit property to the plaintiffs was lawful or not. The other issue for determination is whether the plaintiffs are entitled to the prayers sought in their plaint. A further issue to be determined is whether the counterclaim filed by

the defendant should be allowed. Certain facts are not in dispute in this case. It is not disputed that the defendant was advanced a loan of the sum of Kshs 100,000/= by the first third party in 1989. The said loan was secured by the suit property. The suit property was charged to the said bank. It is not disputed that the defendant defaulted in repaying the said loan that was advanced to her. The bank sought to realise the security that was charged to it by exercising its power of sale by a chargee.

The first attempt to sell the property by public auction in 1996 was unsuccessful. The second attempt on the 18<sup>th</sup> of January 2002 was however successful. The plaintiffs bid for the property and were successful. Their offer of the sum of Kshs 850,000/= was accepted by the bank. They paid the bid price in full. The suit property was thereafter transferred to them by the bank. They were duly registered as the owners of the suit property on the 6<sup>th</sup> of March 2002. Thereafter the plaintiffs sought to take possession of the suit property from the defendant. After initially promising that she would vacate the suit property within a specified period, when the plaintiffs sought to take possession, the defendant became hostile and chased them away. I believed the evidence adduced by the plaintiffs that the defendant prevented them from taking possession of the suit property soon after they had been registered as the owners of the said property.

The defendant testified that the suit property was fraudulently transferred to the plaintiffs by the bank. She testified that no public auction had actually taken place. The evidence of the defendant was however countered by the evidence of the bank and the auctioneer who testified that they followed the established procedure when they sold the said property to the plaintiffs. I have carefully evaluated the said evidence adduced. I am convinced that the bank and the auctioneers followed the laid down procedures when they sold the suit property to the plaintiffs. The defendant admitted in her evidence that she was served with the requisite statutory notices after she defaulted in repaying the loan that was due from her. She further admitted that she saw the advertisement which was published in the newspaper on the 19<sup>th</sup> of December 2001.

Although the defendant claimed that no public auction took place on the 18<sup>th</sup> of January 2002, from her evidence it is clear that she relied on the information that was relayed to her by her husband. Her husband did not however testify in court to confirm that no public auction had actually taken place on the 18<sup>th</sup> of January 2002. In the absence of such direct evidence, the evidence adduced by the defendant was hearsay evidence and was not therefore admissible. This court believed the evidence of the plaintiffs when they testified that they purchased the suit property in a public auction which was organised by the second third party. This court further believed the evidence of the bank and the auctioneer that the public auction did actually take place. I therefore find no merit with the evidence adduced by the defendant that the sale of the suit property to the plaintiffs was tainted by fraud and irregularities. The defendant's counterclaim therefore lacks merit and it is dismissed with costs to the plaintiffs and the third parties. In any event, if the defendant was dissatisfied with the conduct of the public auction, the only remedy available to her was to sue for damages as provided by **Section 77(3) of the Registered Land Act**. She is not at liberty to seek for orders of this court to have the said transfer of the suit property to the plaintiffs reversed or nullified.

The plaintiffs have established that they are the lawful owners of the suit property since the 6<sup>th</sup> of March 2002 when they were registered as the owners thereof. They were deprived of possession of the suit property by the defendant from the 6<sup>th</sup> of March 2002 until June 2004 when the defendant vacated from the suit property. Although the defendant testified that she was forcefully evicted from the suit property by the agents of the bank, this court did not believe her testimony. This court believed the testimony of the plaintiffs that the defendant voluntarily vacated from the suit property. When the plaintiffs took possession of the suit property, they realised that the said property had been extensively vandalised. However the plaintiffs did not amend their plaint to include a prayer that they should be paid damages. Further the plaintiffs did not adduce any cogent evidence supported by documentary evidence of the nature of repairs that they had undertaken on the suit property. This court will not therefore make an award which had not been sought by the plaintiffs in their plaint.

The plaintiffs conceded that their prayer seeking the eviction of the defendant had been overtaken by

events when the defendant voluntarily vacated from the suit premises. However they testified that they should be paid *mesne* profits being the loss of rental income that they suffered when the defendant refused to give them vacant possession. The plaintiffs testified that the monthly rental for the said suit premises was Kshs 10,000/=. I do hold that the plaintiffs have established on a balance of probabilities that they are entitled to be paid the said *mesne* profits. The defendant was in the suit premises for twenty five months after the suit property had been transferred to the plaintiffs. I therefore award the plaintiffs the sum of Kshs 250,000/= as *mesne* profits. The plaintiffs shall have the costs of the suit.

The upshot of the above is that judgment is entered for the plaintiffs against the defendant as hereunder:

- (i) The defendant is ordered to pay the plaintiffs the sum of Kshs 250,000/= being *mesne* profits.
- (ii) The plaintiffs shall have the costs of the suit.
- (iii) The counterclaim of the defendant against the plaintiffs and the third parties is hereby dismissed.
- (iv) The defendant shall pay the costs of the said counterclaim to the plaintiffs and the third parties.

**DATED at NAKURU this 12<sup>th</sup> day of July 2006.**

**L. KIMARU**

**JUDGE**