



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**CIVIL CASE NO. 3242 OF 1985**

**DOMINIC KINUTHIA MUGO .....PLAINTIFF**

**VERSUS**

**DENLAC PAINS MANUFACTURERS LTD.....1ST DEFENDANT**

**DAVID KIARIE MBUGUA .....2ND DEFENDANT**

**KENYA COMMERCIAL FINANCE COMPANY LIMITED.....3RD  
DEFENDANT**

**J U D G M E N T**

The plaintiff was the registered owner of property L.R.36/1/983 (hereinafter called the suit property), in Eastleigh Nairobi. On or about October 1979 the plaintiff mortgaged the suit property to the 3rd defendant for kshs 300, 000/-. In evidence the plaintiff stated that, that amount was to be used in constructing a building on the suit property.

It is accepted that in 1982 the plaintiff fell into arrears in the repayment of loan and by a letter dated 2nd June 1982 the advocate's of the 3rd defendant sent a demand to the plaintiff, seeking from the plaintiff payment of kshs 50, 000 being the arrears to be paid within 7 days and in default the entire debt of kshs 296, 041. 30 would be due.

The plaintiff in evidence said that, confronted with that demand he sought counsel of his nephew, the 2nd defendant who was an officer within the 3rd defendant's bank. The fact that the plaintiff sought this advise is corroborated by an affidavit of Johnson Mbugua Mugo, the father of the 2nd defendant.

The 2nd defendant denies that he was approached by the plaintiff but instead claimed that a third party was approached by the plaintiff. The third party was not called to give evidence and accordingly the court rejects that part of the 2nd defendant's evidence.

The 2nd defendant in chief stated that his co-director in the 1st defendant company informed him that the plaintiff's suit property was being sold by auction and suggested that they should organize their finances in order to buy the property.

It was the plaintiff's evidence that he in 1982 approached the 2nd defendant at this place of work that is at the 3rd defendant's bank. This assertion was, however, defeated by the uncontroverted evidence of the 2nd defendant whereby he stated that he left the 3rd defendant's employment in 1980.

The plaintiff further stated that to get that advise from the 2nd defendant the plaintiff attended to the 2nd defendant's residence one evening and on a Sunday after church service. Although the plaintiff in

evidence said that it was the 2nd defendant who drafted two letters, dated 22nd November and 10th December which were later typed by the 2nd defendant's wife; the plaint is quite contrary to that evidence. Paragraph 17 of the amended plaint, which was paragraph 18 of the original plaint the plaintiff stated; **"In or about December, 1982 the plaintiff on the advise of the second defendant wrote to the Finance Company acknowledging receipt of kshs 200, 000 from Kenlac, such being part price....."**

I think it is pertinent to quote the letter dated 10th December 1982. the letter is written by the plaintiff addressed to the firm Hamilton Harrison and Mathews Advocates, advocates of the 3rd defendant.

**"RE L.R.NO 36/1/983 I refer to the above property and wish to advise that I have agreed to sell the property to M/s Kenlack Paints Ltd; of P O Box 51318, Nairobi at a price of kshs 700, 000. I have already received kshs 200, 000/- and I have been promised that the balance of the funds will come from your end after paying Kenya Commercial Finance Company their dues which is approximately kshs 320, 000/-."**

The plaintiff evidence was that the aforesaid letter together with the one dated 22nd November 1982 were to effect delay of the auction of the suit property by the 3rd defendant. In other words the plaintiff was using these letters to buy him time to arrange redemption of the suit property. The letters indeed had the desired end because, by the letter dated 2nd December 1982, written by the 3rd defendant's advocate, the auction was stopped.

The plaintiff secured an offer for a facility from Housing Finance Company of Kenya Ltd of kshs 400, 000 and the security was to be the self same property charged to the 3rd defendant. The firm of Kirundi & Co. advocates and Ransley Awori Advocates wrote to the 3rd defendant's advocates requesting for the title document in order to prepare the security documents for Housing Finance Company of Kenya Ltd (herein after called HFCK). The firm of Ransley Awori Advocates gave an undertaking. The plaintiff in chief, gave evidence in this regard, and, said that he believed that the equity of redemption had not been lost at this stage.

The plaintiff stated that the response of the 3rd defendant's advocate was a letter dated 9th June 1983 the essence of which stated that, further to the plaintiff's letters which indicated that the plaintiff had agreed to sell the suit property to the 1st defendant, the 3rd defendant had entered into an agreement to sell the suit property to the 1st defendant, by private treaty. The 3rd defendant advocate stated in the letter that the said sale was on the basis that the plaintiff was arrears in interest payment for a period of two months provided in T.P.A. When it came to light that the 3rd defendant was proceeding with the sale, by private treaty, to the 1st defendant the plaintiff in describing his reaction said, "I was stuck". He quoted paragraph 4 of the agreement for sale and said that it clearly showed that his equity of redemption had not been exhausted. The plaintiff filed a suit in July 1983 against the 1st defendant and the 3rd defendant and was granted an exparte injunction but on inter partes hearing the court by its ruling dated 6th December 1983 dismissed the injunction application.

On being cross examined the plaintiff in an attempt to show why he trusted the 2nd defendant said that he contributed to the 2nd defendant's education costs at Makerere University, bought him a parker pen, which he did not do for any of his own children; introduced him to another student who could take care of him at University and even at one time paid for his air fare from Uganda back to Kenya, he ended by saying *"so I had a lot of trust in him."*

The plaintiff in conclusion to his evidence in chief said that he was claiming the payment to him by the third defendant for the value of the suit property as seen in the valuation report of Wairagu & Company dated 6th July 1983, that was two weeks after the transfer, which showed the value to be kshs 1.1 million. The plaintiff also said that he was claiming kshs 61, 092. 90 being the amount of interest debited in his account after the transfer of the suit property was effected.

The 2nd defendant gave evidence on his own behalf and on behalf of the 1st defendant. He said that he is an estate agent, that in 1979 he was working for the 3rd defendant as a credit officer, where he resigned in 1980. In cross-examination he confirmed that his co-director of the 1st defendant, namely Jackson Muriu,

was also an employee of the 3rd defendant at the 3rd defendant's branch, Kipande House. He said that the plaintiff's letters dated 22nd November and 10th December 1982 were copied to the 1st defendant. He denied having drafted those letters, he said, as at the date of those letters he did not own a typewriter. In evidence in chief 2nd defendant said that the negotiations for sale were between the plaintiff and his co-director on being cross examined he retorted "*I don't know when plaintiff started to negotiate with me.*" He further stated that the plaintiff was unable to pay the loan and the property was sold to 1st defendant. He confirmed that he paid the plaintiff in cash kshs 200, 000 of kshs 100/- denomination. He refuted suggestion that the cash payment must have been heavy.

The 2nd defendant in chief gave evidence, which the court will reject out rightly because the same was not put to the plaintiff and accordingly the plaintiff was denied an opportunity to respond. The evidence was to the effect that, the plaintiff was at one time the 2nd defendant's head master, that he was a chairman of IKNO GWATIU COMPANY or that he was secretary in a company co-owned with 2nd defendant's father. The 3rd defendant's witness Mr. Atunda Nyagaka Keogo, said in chief that the suit property was valued in July 1979 for kshs 723, 000. He said that when the plaintiff defaulted in repayment of the facility, the 3rd defendant through its advocates sent a final demand by its letter dated 11th October 1980. That letter demanded from the plaintiff immediate payment of kshs 466, 348 and stated further, "*unless we receive payment within 14 days, our instructions are to arrange for sale by public auction of the immovable property.....*"

He said the sale by private treaty was for kshs 700, 000, Kshs 200, 000 having been paid directly to the plaintiff and kshs 500, 000 being paid to the 3rd defendant. He said that the sale by private treaty was on 10th May 1983 but on obtaining on ex parte injunction, the 3rd defendant could credit the sale proceed to the plaintiff's account, that sale proceed was not indeed credited to the plaintiff's account until 4th April 1984 even though the injunction was discharged in December 1983. He confirmed that the actual transfer of the suit property to the 1st defendant was effected on 16th June 1983. He confirmed that the letter of undertaking of Ransley Awori and advocates was sent on 3rd June 1983, which was before the transfer was effected. He stated that the 3rd defendant needed liquid cash before it could forward the title documents of the suit property, for redemption.

Having summarized the parties evidence I wish to start, in considering this judgment by dealing with the issue raised by the defence that this present suit is res judicata. The 3rd defendant contends that the matters directly and substantially in issue in this suit were in HCCC No 2310 of 1983. That suit according to the evidence and documents tendered in evidence was filed in July 1983. The plaintiff on filing the plaint obtained an exparte injunction. After inter partes hearing the court in its ruling in December 1983 dismissed the injunction application. There was no evidence tendered that the aforesaid suit was ever heard and determined entirely. By letter dated 19th June 1983 a consent was reached between the plaintiff and defendants whereby the suit was with drawn with the plaintiff being granted leave to file a fresh suit. The plaintiff exercised that leave and did file this present suit. Section 7 of the Civil Procedure Act requires a suit whose issues are directly and substantially in issue in a previous suit to have been heard and finally decided by such a court. That is not the case with HCCC No. 2310 of 1983. I therefore do hereby find that this suit is not res judicata.

I have seen issues filed herein and I do not intend to consider them because they are long winded and having heard the evidence hereof I am of the view that they did not fully capture the case before me. I will therefore having in mind the evidence hereof formulate what, I believe ought to be the issues hereof.

Did the plaintiff consult and seek advise of the 2nd defendant with a view to post pone sale by auction the suit property.

The plaintiff was very consistent both in evidence in chief and in crossexamination that he requested the 2nd defendant to assist to postpone the auction of the suit property. The 2nd defendant denied such consultation and particularly stated that he was not in the 3rd defendant's employment when the plaintiff wrote the two letters dated 22nd November and 10th December 1982. In weighing the two witnesses and considering the demeanor of each I am of the view that the plaintiff was more truthful. Indeed I find it believable that the plaintiff, the uncle of the 2nd defendant, would seek the counsel of the 2nd defendant

who was obviously experienced in matters relating to the bank's exercise of its statutory power. It ought to be noted that the 2nd defendant and his codirector in the 1st defendant company were then or at sometime before then employees of the 3rd defendant. I am of the view that both the 2nd defendant and his co-director were privy to certain information with the 3rd defendant's bank and undoubtedly were in a position to manipulate the process of the sale of the suit property to their advantage. I therefore do hereby find that the plaintiff did consult and indeed did get advise from the 2nd defendant on ways of postponing the scheduled auction of the suit property.

Did the plaintiff pay kshs 200, 000 to the 1st defendant as deposit of alleged sale of the suit property?

Having found as aforesaid that the plaintiff was advised by the 2nd defendant on what to do to postpone the sale of the suit property, I do also find that since the intention was to get postponement of the sale that no consideration was given or rather no deposit was paid by the 1st defendant. The 2nd defendant stated in evidence that he plaintiff was paid kshs 200, 000 in cash of kshs 100/- denomination. I find it unbelievable that such large amount of notes could have been paid to the plaintiff in cash and in the absence of evidence that such payment was made, such as receipt or acknowledgment note, I find that the 1st defendant did not pay the aforesaid deposit.

Did the 3rd defendant impede the plaintiff's right to redeem?

Section 60 of T.P.A. provides that after the principal money becomes payable the mortgager, on tendering payment at a proper time and place of the mortgage money can require the mortgage amongst other things to discharge at the costs of the mortgagor, the charged property. The plaintiff did not tender money but obtained an offer for a facility from HFCK but that offer was conditional on the suit property being charged as security. That cannot qualify as payment or tender; neither can a professional undertaking so qualify. I find that the 3rd defendant did not impede the plaintiff's equity of redemption.

What was the value of the suit property on or about the time of sale of the suit property in June 1983?

The value of the suit property as at 6th July 1983 was kshs 1.1. Million.

Was the property sold at under value?

Although the agreement of sale states that sale price was kshs 700, 000 in reality the price was kshs 500, 000. This is because the court has herein before found that the plaintiff did not receive kshs 200, 000. I accordingly find that the sale of the suit property at kshs 500, 000 was grossly under valued this was at less than half of the valuation. This was highly irregular.

Was the sale by the 3rd defendant of the suit property to the 1st defendant, improper, irregular and equitable?

The 3rd defendant in contracting to sell, by private treaty, the suit property to the 1st defendant, on the basis that the plaintiff had agreed to sell the same is irregular and improper. The letters, the 3rd defendant relied upon, were merely just that, letters. There was no indication that the 1st defendant accepted the plaintiff's offer to buy the suit property. The 3rd defendant in view of that improper sale also improperly gave the 1st defendant credit of kshs 200, 000 without there being clear proof that, that sum was paid to the plaintiff. The 3rd defendant had an obligation, before contracting with the 1st defendant, to make proper inquiry regarding those correspondences.

Did the 3rd defendant exercise its statutory power of sale in accordance within section 69 (1) T.P.A.

The 3rd defendant's witness in cross-examination conceded that the 3rd defendant had an obligation to give the plaintiff three months notice of sale of the suit property. The 3rd defendant by their letter dated 11th October 1980 gave the plaintiff 14 days notice to pay and in default threatened sale of the property. In the case **Civil Appeal NO. 133 of 1999 Trust Bank Ltd and Eros Chemist Limited and Another** held in regard to the requisite three months notice required under section 69 (1) T.P.A: -

**“In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless, and until three months’ notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the bank failed to give a valid notice, with the result the right to sale did not accrue under a notice, without any hesitation, the notice in the RUSSEL case threatening a sale of the charged property on a 14 days’ notice was an invalid notice for accrual of a right of sale.”**

From the above quote it is clear that the 3rd defendant’s notice to sell the charged property within 14 days was an invalid notice and no right of sale accrued thereof.

Is the plaintiff entitled to the claim of kshs 61, 908/-?

The plaintiff, in giving evidence in chief, stated that he is entitled to claim this amount, representing the interest debited in his account when the suit property had been transferred to the 1st defendant. The plaintiff failed to point out how this figure is arrived at or which documents he was relying on in support of this claim. I find the plaintiff failed to prove on a balance of probability that he is entitled to this sum.

Is the plaintiff entitled to all or any of the reliefs and declaration?

Having found that the plaintiff did not receive the amount of kshs 200, 000/- allegedly from the 1st defendant, I do hereby find that the plaintiff is entitled to obtain judgment against the 1st defendant for the said sum.

The court herein before also found that the 3rd defendant’s right of sale did not accrue by virtue of lack of sufficient notice and also found that the property was sold at under value. Accordingly the plaintiff is entitled to judgment for the amount of the value kshs 1.1 million less the amount owed to the 3rd defendant which going by the 3rd defendants letter dated 27th June 1984 was kshs 428, 676.85. The amount of judgment that the plaintiff will get as against 3rd defendant is: -

Kshs 1, 100, 000/- value of property.

Less Kshs 428, 676. 85 debt

Less Kshs 200, 000. 00 allegedly paid to 1st defendant

Less Kshs 78, 323.15 Refund amount

Kshs 400, 000.00

The judgment of this court is: -

**(1) Judgment in favour of the plaintiff as against the 1st defendant kshs 200, 000/- with interest at the rate of 14% per annum from the date of suit until payment in full.**

**(2) Judgment in favour of the plaintiff as against the 3rd defendant for kshs 400, 000/- with interest at the rate of 14% per annum from the date of 9th June 1983 until payment in full.**

**(3) The plaintiff is awarded costs of this suit as follows: -¼ of the plaintiffs costs to be paid by the 1st defendant and ¾ to be paid by the 3rd defendant.**

**Dated and delivered at Nairobi this 19th day of May 2005.**

**MARY KASANGO**

**JUDGE**