



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO. 1882 OF 2001

REGINA WAHU MUIGAIPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LTD AND 2 OTHERS.....DEFENDANTS

JUDGMENT

By a plaint dated 11th December 2001 and amended on 12th June 2001 Regina Wahu Muigai [herein referred to as the 1st defendant], LM Gakuu T/A Alfa Auctioneers [hereinafter referred to as the 2nd defendant] and Baliga Ltd [hereinafter referred to as the 3rd defendant] .

The dispute, according to the plaint, is in respect of LR No 1008/99 Karen, measuring 1.6962 hectares and LR No 1000/99, measuring 0.4028 hectares and LR No 1008/66 [original numbers 1008/7/1 measuring 2.099 hectares] [hereinafter referred to as the suit property].

In passing it is significant to mention that LR No 1008/66 [original No 1008/7/1] was sub-divided into two parcels to wit.

- (1) LR No 1008/66 Karen: measuring 1.6962 hectares.
- (2) LR No 1008/99 Karen: measuring 0.4028 hectares.

The plaintiff's case, as pleaded, is that on or about 26th October, 1988 M/s Savings & Loan advanced to the plaintiff facilities amounting to Kshs 1,400,000/66. The mortgage in respect thereof was registered over the property on or about 4th November, 1988.

The plaintiff further pleaded:

- (1) that on 3rd March 1992 she obtained consent from M/s Savings & Loan (K) Ltd. To subdivided LR No 1008/66 into:
 - (i) LR No 1008/66 into 1.6962 hectares
 - (ii) LR No 1008/99 into 0.4028 hectares
- (2) that on 4th March 1992 the plaintiff registered a partial re-conveyance on LR No 1008/99 as per certificate of sub-division of Nairobi City Commission dated 15th March 1991.

(3) That on 10th April 1992 the plaintiff sought banking facilities amounting to Kshs 500,000= . As security M/s Post Bank Credit Ltd registered a mortgage in respect of LR No 1008/99. This left out LR No 1008/66.

(4) That parcel No 1008/99 mortgaged on 10th April 1999 with M/s Post Bank Credit Ltd has never been discharged by way of registration of a re-conveyance.

(5) That on 25th November 1997 the plaintiff registered re-conveyance dated 17th November 1997 in respect of Parcel No LR 1008/66.

(6) That on 25th November 1997 the plaintiff was advanced banking facilities amounting to Kshs 5 million by M/s HFCK and as consideration thereof LR No 1008/66 was charged by a charge dated 17th November 1997.

(7) That the plaintiff avers that the mortgage dated 17th November 1997 over parcel Number 1008/66 was irregular, unlawful and null and void in that:

(i) It purported to charge the entire original parcel of land whereas the same having been sub-divided into LR No 1008/99 and 1008/66.

(ii) Parcel No 1008/99 has not been discharged by way of a registration of a re-conveyance.

(8) That the mortgage describes property known as 1008/66 as measuring 2.099 hectares whereas it is actually measuring:

(1) 1.6922 in respect of LR No 1008/66

(2) 0.4628 in respect of LR No 1008/99

(9) That on or about 2nd October 2001 M/s HFCK sold to Baliga Ltd through LM Gakuu T/A Alpha Auctioneers both parcels of land to wit.

(1) LR No 1008/66

(2) LR No 1008/99

(10) That this, according to the plaintiff, is fraudulent in that whereas LR No 1008/66 and LR No 1008 99 are separate, the Registrar ignored the record and registered a conveyance for the entire parcel. That the Registrar should have registered LR No 1008/66 only as a conveyance. On the premises the mortgage dated 17th November 1997 is null and void and therefore the first defendant had no statutory power of sale.

(11) That in the premises

(i) though the loan was for a period of 15 years, M/s HFCK has sold the same before 15 years which is illegal

(ii) Though the property was valued at Sh 20 million, selling it at Sh 6 million amounts to gross under valuation.

(iii) In any event no re-conveyance was registered before the conveyance dated 2nd October 2001 was registered.

(iv) Though the property was sold, no statutory notice was ever given.

(12) That the plaintiff has secured a purchaser for LR No 1008/66 and is able to sell the property by

private treaty at Ksh 15 million.

(13) That the third defendant has threatened to evict the plaintiff from the property.

For those reasons the plaintiff seeks *inter-alia* orders for:

- 1) a declaration that the mortgage dated 17th November 1997 and registered on 25th November 1997 is illegal
- 2) a declaration that the conveyance dated 2nd November 2001 is illegal.
- 3) a declaration that the sale and transfer of the plaintiff's parcels No LR No 1008/66 and LR No 1008/99 is illegal, null and void.
- 4) a permanent injunction.

The defence of the 1st and 2nd defendants, as pleaded, is that:

- (1) It is admitted that the plaintiff is the registered owner of LR No 1008/ 66 and that the plaintiff charged LR No 1008/66.
- (2) However, the plaintiff was duty bound to discharge any encumbrance to the security presented to M/s Housing Finance of Kenya Ltd being LR No 1008/66 measuring 2.099 hectares.
- (3) Fraud, if any, was perpetrated by the plaintiff.
- (4) The property was not sold at gross undervalue but at forced sale market conditions.
- (5) The plaintiff was served with a statutory Notice and notification of sale.
- (6) Suit property has already been transferred to a third party.
- (7) Plaintiff's equity of redemption was extinguished at the fall of the hammer hence the plaintiff lacks the necessary *locus standi* to institute this suit.

The defence of the 3rd defendant, as pleaded is that:

- (1) The plaintiff obtained a loan of Shs 5 million which was served by a charge over LR No 1008/66 measuring 2.099 hectares.
- (2) In the charge document the plaintiff consented that she had not created any other mortgage in respect of the subject premises.
- (3) The plaintiff confirmed in writing to M/s Housing Finance Company of Kenya Ltd that she had not created any other mortgage on the said premises.
- (4) The plaintiff further confirmed in writing to M/s Housing Finance Company of Kenya Ltd, before creation of the charge that she had abandoned her intention of sub-dividing the land.
- (5) It has now come to light that the conduct of the plaintiff at the time of negotiations was fraudulent and intended to defeat the interest of Housing Finance Company of Kenya Ltd.
- (6) Particulars of fraud as pleaded are that:
 - i) Offering LR No 1008/66 measuring 2.099 hectares as security for a loan when he knew she had excised 0.4028 hectares.

ii) Confirming to Housing Finance Company of Kenya Ltd that she had abandoned sub-division of LR No 1008/66 when in fact she had perfected the excision of the said portion of 0.4028 and re-named it as LR No 1008/99.

iii) Falsely covenanting in the charge that she has not mortgaged any portion of LR No 1008/66 comprising 2.099 hectares.

iv) Despite re-conveyance of LR No 1008/99 from Post Bank Credit Ltd having released to her advocates in March 2000, she withheld the registration thereof.

v) The plaintiff failed to repay the loan and was served with all necessary warnings. Eventually the sale took place by way of – public auction on 17th May 2000.

vi) The subject parcel was knocked down from Shs 6 million to Steve Mwaura Mwangi who subsequently nominated the 3rd defendant for transfer in accordance with the terms of the sale agreement with the Auctioneer (the 2nd defendant).

vii) The land was sold at an auction of 17th May 2000 hence the registration thereof on 2nd October 2000 cannot be impeached, there was therefore no fraud by 1st defendant in favour of the 3rd defendant.

viii) The declarations sought in the prayers of the plaint would amount to regarding the plaintiff for falsehoods.

ix) In any event the plaint does not disclose any reasonable cause of action against the 3rd defendant.

x) The 3rd defendant is a *bona-fide* purchaser for value without notice of the irregularities.

xi) The 3rd defendant's title cannot be defeated on account of the protection afforded to it by section 69 of the Indian Transfer of Property Act.

(7) By way of counterclaim the 3rd defendant pleaded that:

(i) The plaintiff remains on land, collects rent etc while the 3rd defendant continues to suffer loss.

(ii) The Court should confirm by an order to that effect that the land transferred and vested in the 3rd defendant comprises LR No 1008/66 and LR No 1008/99

(8) The 3rd defendant prayed for an order of

i) Eviction

ii) Declaration that the transfer was in respect of LR No 1008/66 and LR No 1008/99

iii) Costs of the suit.

By a Chamber Summons application dated 11th December 2001 the applicant sought injunctive orders against the defendants restraining them from evicting the plaintiff or interfering with the plaintiff's occupation of parcels of land known as LR No 1008/66 and LR No 1008/99 Karen pending the hearing and determination of the application and/or suit. The application is based on the grounds upon which it is made and predicated upon the annexed affidavit of Regina Wahu Muigai sworn on 11th December 2001.

By a Notice of Preliminary Objection dated 5th June 2002 the 3rd defendant urged me to dismiss the application dated 11th December 2001 and the suit itself on three grounds:

i) That the suit and the application are incompetent because the same are time barred by dint of the provisions of section 136 of the Government Lands Act (Cap 280) Laws of Kenya, having been filed long after twelve months since the accrual of the alleged cause of action.

ii) That the suit and the said application are incompetent as they were filed without compliance with the mandatory requirement of section 136 of the Government Lands Act (Cap 280) of serving notice on the 3rd defendant at least one month before the commencement of the action.

iii) The Court, therefore has no jurisdiction to continue with the hearing of the application and the same together with the suit should be struck out with costs to the third defendant.

It is common ground that the plaintiff was the registered owner of LR No 1008/66 [original No 1008/71] measuring 2.099 hectares and charged the said property by registering a mortgage dated 17th November 1997 to Housing Finance Company of Kenya for banking facilities amounting to Kshs 5,000,000/=.

It is further common ground that the said property was sold to a 3rd defendant through the 2nd defendant to a 3rd party and eventually transferred pursuant to a sale by public auction on the 17th day of May 2000.

It is also common ground that the 3rd party [now 3rd defendant] has threatened to evict the plaintiff from the suit property hence this suit and the application for injunction.

What is in dispute is whether prior to the charge, over LR No 1008/66 the plaintiff had subdivided the said parcel into two plots measuring 1.6962 hectares and 0.4028 hectares which resulted into LR No 1008/66 and LR

No 1008/99.

What is further in dispute is whether the mortgagee aforesaid, charged the entire LR No 1008/66 Karen (original number 1008/7/1) measuring 2.099 hectares of LR No 1008/66 measuring 1.6962 hectares being resultant parcel after subdivision of original LR No 1008/66 into LR No 1008/66 [measuring 1.6962] and LR No 1008/99 [measuring 0.4028].

What is also in dispute is whether or not statutory notice and notification of sale were given prior to sale that would invalidate the sale.

A preliminary objection consists of points of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. That was the *dicta* of Law JA in *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696. I adopt the same as the correct proposition of the law.

On the basis of the pleadings as set out hereinabove I have been called upon by the 3rd defendant to make a finding as to whether the three limbs of the preliminary objections are sound in law.

The first point which falls to be decided is whether the suit and the application are incompetent because the same are time barred by dint of the provision of section 136 of the Government Lands Act (Cap 280)

Laws of Kenya, having been filed long after twelve months since the accrual of the alleged causes of action.

Section 136 of the Government Lands Act provides:

“(1) All actions, unless brought on behalf of the Government for anything done under this Act shall be

commenced within one year after the cause of action arose and not afterwards.

(2) Notice in writing of the action, and the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

(3) In every action, the defendant may plead the general issue, and give this Act and the special matter in evidence at the trial to be had thereupon.

(4) No plaintiff shall recover in the action if tender of sufficient amends has been made before action brought, or if a sufficient sum of money has been paid into court by or on behalf of the defendant after action brought, together with the costs incurred up to that time”.

It was argued for the 3rd defendant, that it is common ground that the subject land is registered under the Government Lands Act and title thereto issued under the said Act. It was further argued for the 3rd defendant, that section 4 of the Government Lands Act makes it mandatory to comply with the provisions of the Government Lands Act. That a litigant has to file a suit within twelve (12) months and that before doing so he has to comply with section 136 of the Government Land Act.

It was also argued for the 3rd defendant that the plaintiff has 2 complaints against the defendant to wit:

1) That the charge is invalid and cannot give rise to statutory power of sale.

2) In any event the land was sold fraudulently on 17th May 2000.

The charge is dated 17th November 1997. At page 25 of that charge the chargee confirms that she understood the right of the 1st defendant to exercise its right to sell the property in the event of default. That if she construed or interpreted the document otherwise then she had 12 months from 17th November 1997 to challenge the validity of the charge as she hereby did by this plaint.

Last but not least it was argued for the 3rd defendant, that the plaintiff has always been aware that the sale by public auction took place on 17th May 2000 [See paragraph 12 of the plaintiff’s affidavit sworn on 11th December 2001 and paragraph 6 and 7 of the further affidavit sworn on 14th February 2002].

It was the 3rd defendant’s case that in view of the evidence of the plaintiff as embodied in the affidavits in support of the application for injunction, the fact that the plaintiff is relying on the alleged invalidity of the charge, then she ought to have filed a suit within 1 year after 17th November 1997.

Alternatively, taking the view that the exercise of statutory power of sale created a new cause of action, the suit should have been filed by May 2001 ie 12 months after the auction of 17th May 2001. Instead the suit was filed in December 2000-18 months later. The suit is therefore time barred.

In this regard I was referred to *AG - vs - Makerere University* [1972] EA page 65, which is an authority for the proposition that a plaint barred by Limitation is barred by law and must be rejected. I was further referred to Civil Appeal No 106/2000 *Vijay Morjaria –vs- Nansingh Madhusingh Barbar & Another* which is an authority for the proposition that a suit filed in contravention of section 136 of the Government Land Act [Cap 136] is a nullity (see page 9 of Ole Keiwua JA’s judgment).

It was equally argued for the 3rd defendant, that even if the suit was filed within the time prescribed (12 months) under section 136 (2) it requires a mandatory notice to be served upon the defendant. In this regard I was referred to Civil Appeal No 144/99 *Kiprono Langat vs Kenya Posts & Telecommunication Corporation* at page 4 and 5 (unreported). In that there is no evidence of service. Mr Kimani for the 1st and 2nd defendant associated himself with the submissions of counsel for the 3rd defendant and urged that the suit should be dismissed with costs. For the plaintiff it was argued, that the suit is based on a contract. That limitation is therefore 6 years. That time starts to run in case of fraud from the time of discovery or when a party exercising reasonable diligence would have discovered the fraud. That fraud was discovered at the time of registration of the transfer (See paragraph 15 of the plaint and paragraph 13

and 14 of the affidavit of Regina Wahu Muigai sworn on the 11th day of December 2001.

That in any event where fraud is in issue in a suit section 136 of the Government Lands Act does not apply. In this regard I was referred to *V J Moraria vs Mansingh Madhusingh Arbar (Supra)*.

For the plaintiff it was further argued that section 136 of the Government Lands Act does not apply to this transaction because the act done was not done under the Government Lands Act.

I have on my part listened to and appreciated the arguments and the legal position as enumerated in respective counsel's submission. I have equally considered all the authorities cited before me.

As I understand it the plaintiff's case in reaction to the first limb of the preliminary objection is that the Limitation of Actions Act [Cap 22] applies to land registered under the Government Lands Act. That time, under section 26 of Limitation of Actions Act (Cap 22) begins to run on discovery of fraud.

In my view Limitation of Actions Act recognizes the fact that other periods of Limitation can be prescribed by other Acts of Parliament [See section 31 of Limitation of Actions Act Part III] The Government Lands Act is not ousted by section 37 of the Limitation of Actions Act.

The cause of action arose when the charge was created (17th November 1997). The plaintiff should have sued within 1 year after realizing that she was being cheated.

There was a demand – exhibit "JWNI" – dated 5th July 1999 and notification of sale dated 10th March, 2002. There is a certificate under section 15 of the Auctioneers Act as evidence of service. The letter is dated 10th March 2000. In the premises the plaintiff should have filed suit in the year 2000.

The cause of action arose in the year 2000 when she appreciated that the charge was defective, that the 1st defendant intended to realize the security and that she knew sale was scheduled for May 2000.

The suit should have been filed 12 months after registration of the charge or 12 months after demand was made by the chargee or 12 months after the 1st defendant breached the contract by selling the property by a public auction. The time when the cause of action arises is determined by the knowledge of the facts constituting the cause of action. The knowledge was in the possession of the plaintiff latest 17th May 2000. [See *Dipple – vs – Dipple* [1942] 1 ALL E R page 234].

On the premises I find and hold that ground one of the preliminary point is well taken.

The second ground to be considered is whether the suit was filed without compliance with the mandatory requirements of section 136 of the Government Lands Act Cap 280 Laws of Kenya.

The 3rd defendant argued that it is necessary to serve at least one months notice before commencement of an action under the Government Lands Act; it was the 3rd defendants case that no such notice was sent.

It is significant that the plaintiff's counsel did not put a rejoinder to this point.

Having held that the subject land was subject to the provisions of the

Government Lands Act it follows that the 30 days notice was necessary.

There is absolutely no evidence that such notice was ever served. In the premises the second limb of the preliminary objection is equally well taken.

Last but no least it falls to be decided whether on the premises the Court has jurisdiction to hear the application and the suit. For the plaintiff it was argued that the subject property is not governed by the Government Lands Act. The 3rd defendant took the opposite view.

Having held that the subject land was subject to the Government Lands Act and that the suit should have been filed within twelve months from the year 2000, this court has no jurisdiction to hear the application and the suit therefore.

On the pleadings, on the law and on the evidence I find and hold that all limbs of the preliminary objection are well taken and thereby succeed. The inevitable upshot is that the application dated 11th December 2001 and the suit dated 11th December 2001 and amended on 12th June 2002 be and is hereby dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 3rd day of October, 2003

N.R.O. OMBIJA

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JUDGE