

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 1878 OF 1996

CHARLES KIMANI GATIGWA.....PLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK.....1ST DEFENDANT

JO-MWAKA TRADERS (AUCTIONEERS).....2ND DEFENDANT

DAVID KARITI MUNGAI.....3RD DEFENDANT

J U D G M E N T

By a Complaint filed in this Court on 31st July, 1996, Mr. Charles Kimani Gatigwa (hereinafter referred to as the "Plaintiff") has sued Kenya Commercial Bank Limited, Jo-Mwaka Auctioneers and David Kariti Mungai being the First, Second and Third Defendants respectively for the wrongful sale of his two land parcels known as NDUMBERI/TING'ANG'A/1795 (0.344 hectares) and NDUMBERI/TING'ANG'A/1796 (0.352 hectares).

The Plaintiff in his amended complaint filed on 17th June, 1998 prays for judgment against the Defendants jointly and severally for special damages, general damages, costs of the suit plus interest and setting aside of the sale held on 26th March, 1996. The facts of this matter may be summarized as hereunder:-

In 1992, the Plaintiff was granted overdraft facilities by the First Defendant. That loan was secured by a charge over the two properties aforementioned. In 1994, the Plaintiff defaulted on the loan account. When the Bank threatened to realize its security in 1996 the Plaintiff went before the Senior Principal Magistrate's Court at Kiambu (Miscellaneous Application Case No. 42 of 1996) and obtained an ex parte injunction. That injunction was later lifted when the application was dismissed for want of jurisdiction on 29th April 1996 after the inter partes hearing. The two properties were advertised for sale by public auction in the Daily Nation newspaper of 22nd February 1996 and the auction held on 26th March, 1996. At the auction, the Third Defendant was declared the highest bidder for K.shs. 800,000/=. That sale was illegal as it had been done without issuing to the Plaintiff the mandatory statutory notice under the Registered Land Act.

Presently, liability is not in issue as there is already in place an interlocutory judgment for the Plaintiff in that respect. At this hearing counsel agreed that the only issue for determination was the claim for general damages and that evidence would be led to prove that point only. Therefore, this matter is coming up for assessment of general damages.

Despite what was agreed upon by Counsel, an attempt was made to lead evidence on every aspect of the case. In my humble view all the Plaintiff had to show in this case was the damage he had suffered as a result of the unlawful sale of his property. In view of the agreement by counsel which I have already alluded to, this should be limited to general damages only. That being the case, I consider the testimony of most of the Plaintiff's witnesses, except that of Mr. Job Kamau, irrelevant. I do not consider it necessary to determine the question as to whether the bank was paid the proceeds of the 25% deposit in time or not and whether it has been paid the full auction price as that is not within the purview of what is before the Court. That is a matter between the bank and the highest bidder. The general loss sustained by the Plaintiff in this case would, in my view, be the difference between the price of the security had the sale been lawful and the price obtained as a result of the unlawful sale. The sums expended by the Plaintiff to obtain alternative accommodation upon his eviction fall within the scheme of special and not general damages. That is not in consideration presently.

Mr. Job Kamau, a registered valuer, testified that he valued the properties which had been sold unlawfully at K.shs. 1,375,000/= as the open market value. No evidence was led by the defence to contradict this. It, therefore, follows that the Plaintiff incurred a loss of K.shs. 575,000/= as a result of the illegal auction of his property. This is what he is entitled to claim as general damages against the 1st and 2nd Defendants. I, therefore, enter judgment for the Plaintiff against the said Defendants for that sum together with costs and interest at Court rates.

DATED and DELIVERED at NAIROBI this 30th day of July, 2001.

ALNASHIR VISRAM

JUDGE