



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 2352 OF 1999

CHARLES MAINA MUCHUNUPLAINTIFF

VERSUS

CO-OPERATIVE MERCHANTS BANK & 3 OTHERS ...DEFENDANTS

JUDGEMENT

The Plaintiff in its re-amended plaint seeks the relief set out therein. The relevant orders now sought are: -

- aa) An order setting aside the purported sale and transfer of suit property namely L.R. No. 209/138/41 to the second Defendant his nominees servants, or agents or to any other person whosoever.
- b) Any other order that this honorable Court may deem fit to grant together with costs of this suit.
- c) A declaration that the purported auction sale was a sham and not a genuine sale. d) A declaration that the Plaintiff is still the beneficial and legal owner of L.R. No. 209/138/41
- e) A declaration that the purported sale was illegal on grounds that it was irregular and fraudulent the price fetched being far below the market value of the property.
- f) Alternatively, judgement for the Plaintiff for damages assessed at Kshs.7,200,000/-
- g) Interest on such damages at Court rates from 17/11/99 until payment in full.
- h) Costs of this suit together with interest thereon at Court rates.

It is not in dispute that the first Defendant in purported exercise of its statutory power of sale caused the suit premises herein to be sold at public auction on the 17th November 1999 and that as a result the 2nd Defendant who was the purchaser at the auction purchased the suit premises for Shs.7.8 million and that subsequently the property was transferred into the names of the 5th Defendant, the 2nd Defendant's company, subject to a charge in favour of Barclays Bank of Kenya Limited.

The present suit has been consolidated with HCCC No. 1574 of 2000 which was brought by the 5th Defendant against the Plaintiff seeking against the Plaintiff an order for possession of the suit premises and mesne profits from the 17th November 1999 until vacant possession is given.

It is further not in dispute that the Plaintiff applied for loan facilities from the first Defendant and that by a letter of offer of the 9 July 1996 the 1st Defendant advised the Plaintiff that a loan facility of 2.5 million had been approved on the terms set out therein which loan was accepted by the Plaintiff. The loan

was to be repaid over six years repayable by installments of Shs.72,100/- per month with interest thereon at 29% subject to variation without notice. The loan was to be secured by a charge over the suit premises. On the 10 December 1996 the 1st Defendant approved a further loan to the Plaintiff of Shs.600,000/- making a total loan facility of Shs.3,100,000/-. The further sum of Shsh.600,000/- was to be repaid in full by the 15/10/96. (This is an error and should be 15/10/97) by 6 installments of Shs.100,000, each together with interest thereon at 29%. The security was to be an additional legal charge over the suit premises. Mortgage documents were prepared, signed and registered against the title to the suit premises pursuant to the loan agreements.

The Plaintiff maintains that he repaid the sum of Shs.600,000/- by the agreed installments of Shs.100,000/- each with interest. With regard to the loan of Shsh.2.5 million he alleges he paid the same by installments of Shs.72,100/- plus interest thereon and did not default. In his evidence, the Plaintiff stated that from 1996 to 1998 he paid without defaulting but that from January 1999 to the end of April 1999 he defaulted in payments as he had been promised 800,000/- which did not materialize. He also admitted that at the time he defaulted his account was in debit to the extent of Shsh.2.4 million. He received from the Bank a letter dated the 14/5/99 demanding Shs.4.4 million which he thought was an error. The letter is No. 6 in the bundle. No. 7 is a letter written by the Plaintiff requesting three months from the 14/8/99 to be able to repay the loan. He stated he wanted to sell two shops and if they were not sold he would sell Heshima Hotel Limited the suit premises.

In support of his contention the Plaintiff sought the assistance of Mr. Moturi an accountant auditor and consultant who gave evidence and produced a report and reconstructed account. From this account, it is to be noted that at the 31/10/99 the account was in debit to the extent of Shs.3,239,325.40. This witness attached the Bank statements which he says he had analyzed and as a result prepared a reconciliation statement of the loan account for the years 1996, 1997, 1998 and 1999. From these statement on G-5 the witness concluded that as at the 30/5/99 Shs.2,408,311.50 was owed by the Plaintiff and not Shsh.4,414,545.30 as claimed by the 1st defendant in its letter of the 14/5/99. In cross-examination, Mr. Moturi admitted he was not a chartered accountant. He also admitted he was not licensed to practice as an accountant nor could he qualify or sign accounts. He also admitted to having been charged with a criminal offence relating to obtaining money by false pretences. He agreed that the last installment of Shs.72,017/- was paid on 3/3/97 less than a year after draw down. He also agreed interest could have been incurred during the period no repayments were made. He admitted that the amounts in the sums of Shs.50,000/- and 146,306.00 may have been mistaken and that these mistakes could have affected the rest of his account. It would affect the interest charged. He admitted the mistakes would compound the mistakes of the figures carried forward.

The 1st Defendant, called Charles Mutunga from the Bank is Credit Department who had dealt with the Plaintiff account. He heard Mr. Moturi's evidence. He referred to a sum of Shs.545,445.00 which Mr. Moturi had treated as a credit which was wrong. This is contained in document A and marked 4. The accounting of the 1st Defendant is somewhat confusing as it kept in two accounts one reflecting payments and the other arrears. It is not to some extent surprising that Mr. Moturi was confused. After crediting the proceeds of sale of the suit premises, the Plaintiff was in credit and had in fact withdrawn some of this credit and still has a sum of Shsh.500,000/- in his account. In crossexamination, this witness said the two loans of Kshs.2.5 and 600,000/- had been consolidated. Interest rates had varied and had increased to 30% per annum. He agreed the six installments of Shs.600,000/- had been repaid in time but that the Plaintiff had defaulted in payment of the Shs.72,017/- installments. He did admit that interest was charged at 54% to arrears. This was a penal rate of 21% per month on late payments which together with interest at 30% per month made 54%. He also stated that the reserve price in the auction sale was Shs.7.8 million. I will make my findings on the state of the accounts later.

As a result of the default the first Defendant served a statutory notice on the plaintiff and instructed the third Defendant to sell the property by public auction. Mr. Joseph Mungai Gikonya who is a licensed auctioneer and trades in the name of the second Defendant gave evidence that he received instructions from the 1st Defendant to sell the suit premises. He prepared a notification of sale and served it on the Plaintiff personally on the 10/9/99. After 45 days the property was advertised for sale and the auction took place on the 17/11/99. The auction was held in their showroom with a capacity for 30 to 40 people.

The premises are extremely accessible and a stand was put on the road showing where the hall was.

The auction commenced at about 11 a.m. The reserve price of Shs.7.8 had been notified to the witness on the day of the sale by the 1st Defendant. This is the usual practice. There were five active bidders including the second Defendant and Mr. Awino who was representing the Plaintiff. The witness knew he was an Advocate of the High Court. The 2nd Defendant he did not know. Mr. Awino bid to 7.66 million. He knocked the price down at 7.8 million which was bid by the 2nd Defendant. At that time, he had not got the 25% deposit and went off to get it. The witness told the audience that if there was any higher bid he would take it before the 2nd Defendant returned. There were no other bids. The 2nd Defendant returned within half an hour with the deposit in the form of a bankers cheque. He then signed the conditions of sale.

The Plaintiff called a Mr. Rachier an Advocate with Messers Otieno Okeyo. Mr. Okeyo instructed him to attend the auction on the 17/11/99 on behalf of the Plaintiff and observe the proceedings. He was there at the beginning and the bidding went to 7.8 million and there were no further bids. The auctioneer said the bidder should pay 25% by a cash deposit or cheque. A gentleman not known to the witness left the sale and after less than five minutes returned and handed over what was described as a bankers cheque. The property was then declared sold. In cross-examination he agreed that Mr. Okeyo had offices in the same building as a Mr. Awino but did not know what arrangements they had. He knew Mr. Awino but did not think the name "Awino Okeyo" suggested a partnership between them. Mr. Okeyo was the Plaintiff's lawyer. He said he attended the auction as the representative of Mr. Okeyo but did not know why or under what auspices he was instructed. He agreed there were more than two bidders and that no bid was made in excess of Shs.7.8 million.

The 2nd Defendant also gave evidence and said he went to the auction on the 17/11/99 having seen an advert on the Daily Nation. He made a bid of 7.8 million and the property was knocked down to him. He paid the 25% deposit with a bankers cheque. In cross examination, he said he knew the Plaintiff well they came from the same village, also both his father and the Plaintiff had shares in a company called Top Hat Limited and he had been running the business for both of them. The 5th Defendant was his company which he had formed in 1995 to sell tyres. He attended the auction on behalf of the 5th Defendant. There was a bid of 7.7 million but he bid 7.8 million. He left the hall to get the deposit but the auctioneer said if there was a higher bid he would accept it.

The second Defendant had made arrangements with Barclays Bank to borrow up to 2.5 million and it was against this facility that he got a bankers cheque for the 25% deposit. He informed the bank he was prepared to bid up to Shs.10 million. The finance given to him was subject to the bank's conditions. He borrowed in all 1.95 million the deposit and a further 5.3 million. He paid the balance. The balance of the purchase price was not paid within 30 days as the Plaintiff had obtained an injunction stopping the transfer and as a result the Bank would not release the money. The injunction was lifted and the sale was completed after the lease of the suit premises had been extended. The property was registered in the name of the 5th Defendant.

He had attempted to levy distress against the tenants in the suit property but the tenants got a Court order stopping the distress.

The Plaintiff called Mr. Stephen Bonface Murithi a valuer to give evidence. He did a willing buyer willing seller valuation on 15/10/99 and produced a valuation showing the suit premises to be worth Shs.15 million. The first Defendant called Mr. Joseph Wanjao Gathuri a registered valuer of ten years standing who produced a valuation by his company Horizon Associates Limited showing the open market value as Shs.11.2 million and the forced sale value as Shs.7.8 million. In cross examination, he explained that the market value was dependent upon what other properties in the neighborhood sold for the forced sale value was 70% of the value and the willing buyer willing seller price is the best price which can be obtained.

The 2nd and 5th Defendants called Mr. Paul Ngugi Mungai a registered valuer who prepared a valuation dated the 8/12/99. His instructions were to determine the current open market value. He stated

that the suit premises area three story building with offices and lodgings. The premises were let for Shs.175,999/- per month being the total rentals. His valuation shows a figure of Shs.197,000 per month being the current open market value, his increased assessment being based on the fact that Kirinyaga Road had been recarpeted.

The first issue to address is the allegation by the Plaintiff that he had repaid the same of Shs.600,000 and had diligently paid the installments of Shs.72,100 per month in the loans of Shs.2.5 million and as such the 1st Defendant had no right to sell the suit premises.

Even in the Plaintiff's own evidence he admitted that he had defaulted on the installments. His contention was that the amount of Shs.4,414,545.30 claimed by the 1st Defendant in the letter of the 14/5/99 was wrong and that the correct figure was Shs.2,408,311.50. This was the figure arrived at by Mr. Moturi in his report. It was evident however, that Mr. Moturi's accounts had errors in them which have been pointed out herein and which lead to a wrong result. I was not impressed with Mr. Muturi's evidence and am unable to rely on his figure with any confidence.

In arriving at its figure, the 1st Defendant has charged into the account both interest and other charges. The interest stated in the two letters of offer were 28% and 29% respectively. They had been exceeded from time to time and as admitted by Mr. Mutunga reached 54% being interest of 30% plus a penalty rate of 2% per month. The mortgage documents provided that the 1st Defendant was entitled to charge interest in the following terms:

“The Mortgagor shall pay interest on the full amount of the loan (and for the purposes of this sub-clause such sums as have been incurred as expenses as hereinafter defined and such sums as have been incurred under the stipulation regarding interest as defined herein and compounded to the loan amount are deemed to be part of the loan amount) for the time being and outstanding from time to time at the rate of Twenty Eight per centum per annum PROVIDED THAT the lender in its sole discretion determine the rate of interest applicable to the loan from time to time subject to legal provisions (if any) prescribing the maximum permitted rate of interest for loans of similar kind PROVIDED FURTHER THAT the lender shall not be required to advise the Mortgagor or the Borrower prior to any change in the rate of interest so payable nor shall any failure by the lender to advise the Mortgagor or the Borrower as aforesaid prejudice in any way howsoever the recovery by the Lender of interest charged subsequent to any change.”

The bank mortgage contained similar provisions in Clause 1. In both cases the 1st Defendant had a discretion to charge the rate of interest without notice to the Plaintiff. The mortgage provides for the payment of commissions, charges costs and expenses.

I am satisfied that the accounts are prepared by the 1st Defendant in accordance with the terms of the mortgage documents and that the figure of Shs.4,414,545.30 was correctly claimed.

I find that the Plaintiff did not pay the installments on the due dates and that he was in default leading to extra interest and costs being charged to his account.

I further find that the 1st Defendant had a right to sell the suit premises under its statutory power of sale.

The Plaintiff alleges that the auction was fraudulent, as is particularized in the plaint in paragraph 10.

Paragraph 10(a) states the price obtained was below the market value. 10(c) Mr. Gitonga gave evidence of serving a notification of sale which accorded to the provisions of the Auctioneers Act, notice was put in the Daily Nation on at least two occasions and a board was put outside the auction room indicating where it was. There is no evidence of snap bids having been called without notice. I reject this allegation therefore.

Clause 10(a) I accept the evidence of Mr. Gikonya and the 1st Defendant that the auction had not closed

when the 1st Defendant went to collect the 25% deposit and that further bids could have been made whilst he was absent. I was not impressed by Mr. Rachier's evidence and do not believe him when he said the second Defendant went off for only five minutes. I accept the evidence of Mr. Gikonya and the 2nd Defendant on this point. I find that there was no collusion between the 2nd Defendant and Mr. Gikonya and the 1st Defendant. I am satisfied that the 2nd Defendant was a genuine bidder and made the highest bid in good faith. I am also satisfied that the auctioneer bid the property up to the reserve price as it is proper for him to do and the evidence of the valuers called by the Plaintiff and 1st Defendant related respectively to three methods of valuation. Firstly, a willing buyer willing seller value. Secondly, the open market value and thirdly a forced sale value.

In this case, the suit preserves were sold at public auction and the proper valuation was the forced sale value. The Plaintiff's witness did not give evidence of what he considered this to be and I am satisfied that the evidence of Mr. Gathera is fair and accurate as far as the forced sale value was concerned. I accept that 7.8 million is a fair value, therefore, and that the sale at that price was not mala fides but a correct value.

In paragraph 10(b) the Plaintiff complains the auction was conducted in a private place. The evidence of Mr. Rachier, Mr. Gitonga the auctioneer and the 2nd Defendant was all to the effect that the auction took place in a public place and that there were a number of persons present and more than two were bidding. I accept Mr. Gikonya's evidence as accurate and that the auction was conducted in a public place in a fair manner that the second Defendant had no knowledge of the reserve price at the time.

Clause 10(e) The 2nd Defendant explained and I accept his explanation that the delay in paying the balance of the purchase price was due to Barclays Bank refusing to lend the money due to an injunction being granted by the Court to restrain the transfer of the property to the 5th Defendant, indeed to have done so would have been in contempt of a Court order.

Clause (f) no evidence of malice was given of malice between the 2nd Defendant and the Plaintiff and I find that none exists. I accept that the 2nd Defendant's father and the Plaintiff were in business with each other but this is not relevant and I reject any suggestion that the relationship between these parties led to anything improper being done in collusion with the auctioneer and sale of the suit premises to the 5th Defendant.

In the result I find that the Plaintiff has failed to establish his case and that the Plaintiff equity of redemption was extinguished in accordance with section 60 of the Indian Transfer of Property Act and under Section 69B of the Indian Transfer of Property Act a mortgagee exercising the statutory power of sale has power to transfer the property sold freed from all estates and interests as may be subject to the mortgage and where such a transfer is made the same is unimpeachable on the grounds set out and the only remedy is in damages.

If I am wrong I have to have to access damages. If damages were to be awarded I would access them in the sum of Shs.3.4million being the difference between the forced sale value and open market value. I do not think damages should be assessed on the willing buyer willing seller value as this is a special value of which direct evidence would be required that there was such a purchaser of this bid.

With regard to the suit I dismiss the same against all of the Defendants and find that the 2nd and 5th Defendants have succeeded on their counterclaim as the Plaintiff has been wrongfully in possession of the suit premises since the date of the auction sale. I award mesne profits in the sum of Shs.197,000 per month. From the 17/11/99 until the date when possession is given to the 5th Defendant. I order that the Plaintiff do give such possession of the suit premises forthwith but do not award any interest on the mesne profits. The sum of Shs.350,000/- claim for costs is not properly claimed as the 5th Defendant is not entitled to these costs except as the result of an order of the Court.

The Plaintiff will pay the Defendants costs of this suit to be taxed as agreed.

DATED and DELIVERED at Nairobi this 5th September 2001

P.J. RANSLEY

COMMISSIONER OF ASSIZE