



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1502 1999**

**NDEGWA KABOGO.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE MERCHANT BANK LTD.....1<sup>st</sup> DEFENDANT**

**JULIUS MAINA.....2<sup>nd</sup> DEFENDANT**

**JUDGMENT**

On 6/7/1995, Ndegwa Kabogo the plaintiff herein, charged his property namely LR.No 12825/1 to the Co-operative Merchant Bank Ltd(hereafter called 'the bank') to secure a facility of shs. 7,000,000.00. The bank exercised its statutory power of sale and disposed of the subject property by way of public auction on 24/5/1999, when Julius Maina, the 2<sup>nd</sup> defendant herein acquired it, and has since disposed of it at shs. 8,000,000.00.

It is the plaintiff's contention that the auction and the sale was unlawful, improper and irregular and that it amounted to a conspiracy between the auctioneer and the 2<sup>nd</sup> defendant. He however does not specifically plead the nature, of conspiracy, but contends, that other prospective and bidders who were willing to offer more for it were denied an opportunity to make their bids. It is also his contention that while the current commercial market value of the property is shs.30,000,000.000 the price at which it was sold, being shs. 7,400,000.00, was an undervalue.

Thus, by his re-amended plaint, he prays for judgment against the bank and Maina for damages equivalent to shs.22, 500,000.00. This I discern as the difference between the value of the said property as at when he had it valued on 5/8/1999 and the forced sale value.

He also prays for costs of the suit and interest therein.

The defendants deny that the auction was carried out improperly or irregularly and further that there was any conspiracy between the auctioneer and the 2<sup>nd</sup> defendant. The bank avers that the property's open market value had been assessed at shs. 10,000,000.00, and that its forced sale value was shs. 7,000,000.00, and that it was sold to the highest bidder.

The bank has also counterclaimed for shs. 15,392,030.95 being the balance outstanding as at 15/10/1999 after having credited the sale proceeds to the plaintiff's account, which sum continues to accrue interest at 36% p.a. until payment in full.

In his evidence, the plaintiff conceded that the bank was right in exercising its statutory power of

recovering the loan when the property was sold by public auction on 24/5/99, it was however his evidence that, although the highest bid was for shs. 7,900,000.00 which bid was accepted by the auctioneer without calling out thrice for other higher bids, it was later documented as shs. 7,400,000.00.

It is not in dispute that at the time when he created the charge over the property in 1995, it had been valued at shs. 12,000,000.00, but at an earlier attempted auction, in December 1998, the highest bid had been shs. 3,000,000.00.

He did concede that he had not developed it further since charging it to the bank, and it remained a coffee plantation, which he had not yet subdivided. He however urged the court to base its findings and judgment on the current value of the plot, which had been estimated by his value at shs. 30,160,000, as at August 1999.

The evidence of Solomon Kiragu Thandi, one of the alleged prospective bidders for the property at the auction did not appear credible. He informed the court that he attended an auction, where he did not know who the auctioneer was, to buy a property which he had not seen prior thereto, nor did he know on whose behalf the property was being sold, and neither could he remember its registration number. It was his evidence that he had intended to purchase the property at the auction and had set aside shs. 18,000,000.00 for the purpose, but that he had not been allowed to raise his last bid of shs. 7,700,000.00 as the hammer fell before being given an opportunity to do so. His bids were based on his belief that the property was residential and not an agricultural. However, it was evident, and the court was later informed, the property was actually an agricultural property. It was quite clear that he was not being truthful in his evidence. In any event as was disclosed by the auctioneer in his evidence, Thandi had gone to the auction mart to oversee the sale by auction of his brother's property which was also due for sale on the same day. Thandi had actually not made any bids for the purchase of the subject property. The auctioneer's evidence would appear to be more credible and I choose to rely on it.

Likewise, the evidence of the other prospective bidder, J. Muli, was not credible, as he had, during a previous auction of the same property made a bid, which he did not fulfill. In any event, as it later transpired, during cross-examination he was a friend of the plaintiff and both had been parties in an earlier transaction, whereby he would buy an adjacent property for shs. 10,000,000.00. The agreement for sale in that transaction had been dated 17/12/1998, a day prior to the day when the bank initially intended to sell the subject property by public auction. It is worthy of note that it was at that auction, where though he had been declared the highest bidder, he did not make any payment and thus rendered the auction unsuccessful. After that auction, that they had abandoned the idea of the agreement of the sale of the said adjacent property. To my mind that transaction had been concocted with a view to hoodwinking or stopping the bank from proceeding with its recovery efforts during that particular sale of 18/12/1998, which had aborted due to his inability to fulfil his bid.

I shall now deal with the issue of the value of the property on which this claim is based.

By his original plaint of 25/5/1999 the plaintiff had based his claim on a value of shs 15,000,000.00 for the subject property. Upon re-amendment, on 11/7/2000, the value was enhanced to read shs. 30,000,000.00

The valuer who had undertaken the valuation of the property on 5/8/1999, and on which the plaintiff bases his claim, gave it a value of shs. 30,160,000. I shall however have to disregard the valuation report, as the valuer's credibility was questionable. He conceded during cross-examination, that not only had he been untruthful in his evidence about the number of years that he had been suspended by the Institute of the Surveyors & Valuers, but that he had been suspended for having overvalued a property and for which he was made to the difference between the amount lent on the basis of that valuation and the amount realised by the mortgagor upon sale. He was also not licensed to undertake valuations having not renewed his practising licence for the year 1999, yet he carried out the valuation of the subject property contrary to the requirements of section 21 of the Valuers Act.

The evidence of the bank's appointed valuer was more credible and I

do accept her valuation figure of shs. 10,000,000.00 even though priorthereto some years earlier, the property had been valued by the bank at shs12,000,000.00. She attributed the decline in value to the prevailingeconomic conditions,"-which have led to a decline in the market forproperties, especially large properties such as this one.

To my mind the issues that arise in this suit therefore are, under whatcircumstances would a mortgagor be entitled to damages in a case where themortgagee has exercised its 'statutory power of sale, and completed thetransfer of the mortgaged property.

In my understanding, the plaintiff would only succeed in his claimwhere the property has been sold at a gross undervalue and/or where fraud isalleged and proven, in which case it must be specifically pleaded andparticularised..

Though it is the mortgagees duty to obtain the best price available atan auction, being a forced sale, he however does not owe a duty of care tothe mortgagor. I am convinced that when the bank obtained the price ofshs.7,400,000.00, it was the best possible price, based on a valuation of shs10,000,000.00.

The plaintiff further alleges a conspiracy, on the basis of the fact thatalthough it was a term of the sale that the deposit of 25% of the accepted bidshould have been made at the fall of the hammer to the auctioneer, it was notmade, until 7/6/1999, to the bank. Thereafter the balance was not paid until2/9/1999. That was a delay of over two months. However in view of thefact that no ample evidence of was advanced of the conspiracy, none can andshould be inferred. Evidence was adduced by the "nd defendant that thedelay in remitting final payment arose out of the fact that the applicant hadmoved the court and filed his application for an injunction on 28/5/1999.But, I find that was four days after the sale and the initial deposit that shouldhave been made on 24/5/1999 was not made until 7/6/99. It is quite evidentthat the delay was not solely as a result of the filing of the suit, but due toother factors, In view of the fact that the property has already beentransferred, I am of the opinion, that delay should not be prejudicial to theplaintiff. The interest charged on the balances that would have remained outstanding, after 24/5/1999 and 23/6/1999, when the deposit and balance ofthe sale price should have been paid, should not have been debited to hisaccount. Those entries should thus be reversed.

Otherwise, I agree with the submissions of Mr Ohaga, for both thedefendants, that an allegation of conspiracy cannot by itself found orconstitute a cause of action, as the plaintiff has sought to do in this case.The conspiracy must be between two people who intend to commit aparticular illegal act. No fraud was specifically pleaded and that being thecase, that no cause of action has been disclosed. In any event the auctioneer,against whom the allegation is conspiracy is alleged, was not made a party tothe proceedings, and not being a party, an allegation of conspiracy can lieagainst the 2<sup>nd</sup> defendant only.

In view of the above, the re-amended plaint has failed to disclose acause of action against the 2<sup>nd</sup> defendant and the same is hereby dismissedagainst him with costs.

Further I find that the plaintiff has failed to prove his case on abalance of probability against the bank and the suit is likewise dismissedwith costs.

I do enter judgment for the bank for the sum claimed in thecounterclaim, which was not disputed or challenged, save for the interest

which I have referred to hereinabove which should be reversed in the account, as ordered.

Dated and delivered at Nairobi this 4th day of October 2000.

JEANNE W.GACHECHE

COMMISSIONER OF ASSIZE