



REPUBLIC OF KENYA



KENYA LAW

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**Maina & another v CFC Stanbic Bank Limited & 2 others (Civil Case 20 of 2014)
[2025] KEHC 2201 (KLR) (Commercial & Admiralty) (3 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 2201 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE 20 OF 2014
A MABEYA, J
JANUARY 3, 2025

BETWEEN

TITUS WAGENI MAINA 1ST PLAINTIFF
ROSE WAMBUI KABUE 2ND PLAINTIFF

AND

CFC STANBIC BANK LIMITED 1ST DEFENDANT
KESIAN AUCTIONEERS 2ND DEFENDANT
DIANA KWAMBOKA ONTIRI 3RD DEFENDANT

JUDGMENT

1. The plaintiffs filed this suit on 21/1/2014, which was amended twice, on 28/2/2014 and 19/4/2018, respectively. The plaintiff's case was that the sale of the property, L.R. No. 209/19594 ("the suit property") by the 1st and 2nd defendant to the 3rd defendant through a public auction was illegal, null and void.
2. The Plaintiff therefore sought that judgment be entered against the defendants, jointly and severally, for several declarations and orders as follows: -
 - a. A declaration that the Charge instrument dated 25/1/2011, is invalid, defective, illegal and void.
 - b. A declaration that the statutory notice of 9/5/2013 and the sale notice issued by the 1st and 2nd defendant are invalid, fraudulent and void.
 - c. A declaration that the defendants had no right to sell the suit property and that its sale to the 3rd defendant was unlawful and void.



- d. An order requiring the 1st defendant to discharge the charge and return the title documents to the plaintiffs or for the Deputy Registrar to act on behalf of the 1st defendant to do so.
 - e. An order for a permanent injunction preventing the defendants from selling, altering, subdividing, or otherwise dealing with the suit property.
3. Alternatively, the plaintiffs prayed for an extension of the compliance period for statutory notices to allow them to redeem the property. The plaintiffs also sought compensation for Kshs. 2,389,172.05 paid under the charge, damages for the unlawful sale of the property and an order for the 1st defendant to provide a full and accurate account of all payments received including interest.
 4. In its statement of defence dated 19/6/2020, the 2nd defendant denied the plaintiff's claim in its entirety and contended that it was not privy to the issues raised by the plaintiff. It stated that the plaintiffs obtained a home loan with full knowledge of the applicable terms and conditions, which included their agreement to charge the property suit property (L.R. No. 209/19594 (formerly L.R. No. 209/12875/12)).
 5. That the plaintiffs further agreed to the payment of interest, fees and charges, which the 1st defendant retained the right to vary at its discretion. That the plaintiffs defaulted on the loan and whereby, after issuing the requisite notices, it exercised the statutory power of sale. The property was subsequently sold at a reasonable price. That by the time the court orders issued on 22/1/2014, were served on the 2nd defendant, the suit property had been sold to the 3rd defendant.
 6. The 3rd defendant claimed to be a bona fide purchaser of the suit property after being the highest bidder at the auction held on 22/1/2014. She asserted her right to vacant possession of the property based on this claim. She hinged her claim on the ability to demonstrate that she acquired the property in good faith and without notice of any competing claims.
 7. At the hearing, the witnesses adopted their witness statements and produced their respective bundles of documents as evidence. They were subjected to cross-examination. The plaintiffs called two witnesses in support of their case, while the defendants called two witnesses. The third defendant did not adduce any evidence.
 8. Pw1 Titus Wageni Maina, the 1st Plaintiff adopted his witness statement and documents dated 19/5/2020. He testified that the Charge on the property was defective due to an inadequate description, improper execution by the 1st defendant and lack of proper attestation. He also claimed that, between May 2012 and July 2013, the 1st defendant charged fluctuating interest rates thereby violating section 44 of the *Banking Act*.
 9. He further contended that the statutory notice dated 9/5/2013, was flawed because it demanded the full loan balance instead of the arrears, contrary to section 90(2)(b) of the *Land Act*. He confirmed receiving a 45-day notice and mentioned that advertisements published, referred to a different parcel of land. He stated that the 1st defendant lacked the legal authority to sell the suit property due to the absence of proper statutory notices and that despite debiting his account, the 1st defendant had not discharged the title.
 10. In cross-examination, he admitted that no payments were made from August 2012 to January 2014, except for a Kshs. 1.5 million advance in July 2012. That the auction took place before the notification of the sale had expired. He identified the 3rd defendant as the highest bidder.
 11. In re-examination, the 1st Plaintiff insisted that the sale did not pertain to his property but confirmed that Ksh. 8.5 million had been paid by the 3rd defendant towards the purchase of the property.



12. PW2 George Watiri testified that he attended the auction both to bid and observe. He confirmed that no court order was served during the auction. According to him, the auction was not concluded on the day it began. He told the Court that that he was the only person who participated in the bidding and that he signed in position 3 on the bidding register. He stated that the highest bidder was associated with Keysian Auctioneers.
13. DW1, Amos Mugambi, testified on behalf of the bank. He told the Court that the 1st defendant provided a loan to the plaintiffs who defaulted in repayment. As a result, the 1st defendant instructed the 2nd defendant to conduct an auction, with a 45-day notice issued and the sale advertised. The auction occurred on 22/1/2014, with the highest bid of Kshs. 13,517,000/- being from the 3rd defendant. That a deposit of Kshs. 3.5 million was made and thereafter followed by an additional Kshs. 8.5 million, leaving a balance of Kshs. 5,070,000/- which was due within 60 days. He told the court the balance remains unpaid.
14. He stated that the statutory notices were correctly issued and the suit property was registered in the joint names of the plaintiffs. He also explained that the memorandum of sale indicated the Kshs. 3.5 million deposit would be forfeited if the balance wasn't paid within 6 months.
15. In re-examination, he clarified that despite the Plaintiffs' failure to pay, their account was redeemed on 11/3/2015, from the proceeds of the sale. That the plaintiffs were still in possession of the property.
16. DW2, Fredrick Otieno, testified that the auction took place on 22/1/2014, with the 3rd defendant emerging as the highest bidder. He informed the Court that the auction ended at 11:15 a.m. That a Court order was served on the auctioneer's office at noon after the auction had been completed. That the order had been overtaken by events. He stated that the property described in the advertisement was the same as that listed on the title. According to him, in issuing the notices, the auctioneer relied on the property description provided in the instruction letter.
17. In cross-examination, he stated that the advertisement attracted five bidders and the payment of the deposit was forwarded to the 1st defendant. He informed the Court that he was unaware if the 3rd defendant had paid the remaining balance. He also explained that the forced sale value of Kshs. 8,000,000/- stated in the notification of sale was a typographical error as the correct value was Kshs. 13.5 million.
18. He further explained that at the time of issuing the notification, he did not have a copy of the valuation report, as it had not yet been provided. However, he confirmed that he had a current valuation report during the auction. He stated that, under the Auctioneers rules, he was not required to have the valuation report before issuing the notification of sale but it was necessary to have the same before the auction was conducted.
19. He informed the court that after the sale, he issued a memorandum of sale but not a certificate of sale. That the Court order referred to L.R. No. 209/19594, which differed from their documents listing L.R. No. 209/12875. However, he confirmed that the instruction letter referred to Maisonette No. 104, L.R. No. 209/12875 and he proceeded with the auction based on this reference.
20. That marked the end of the case as the 3rd defendant did not adduce evidence despite the matter being adjourned severally to accommodate her.
21. All the parties filed their respective submissions which are all dated 14/5/2024.
22. The Court has considered all the pleadings, the evidence and the submissions on record. The issues for determination are: -



- a. whether there was a lawful Charge created over the suit property;
 - b. whether there was an overcharge of interest;
 - c. whether the misdescription of the property vitiated the statutory power of sale.
 - d. whether the plaintiffs were issued with the statutory mandatory notices,
 - e. whether the auction of 22/2/2014 was lawful and what orders should be made.
23. The first issue concerns the legality of the Charge created over the suit property. The plaintiffs contended that the bank or its representative failed to properly execute the Charge document. I have seen the Charge dated 25/1/2011. The same was executed by the plaintiffs in the presence of their advocate, Anthony Wachira. On the bank's side, it was signed by the duly constituted attorney of the bank in the presence of the bank's advocate, June Onyango. I have observed that both parties had legal representation during the execution of the Charge document and was properly executed.
24. Further, the Charge was registered on 2/2/2014 with the Land Registrar. It is important to note that for a Charge to be registered, it must meet specific statutory conditions. The registration process serves as a public notification of the Charge and provides legal protection to both parties.
25. In the Court's view, the plaintiffs' challenge to the validity of the Charge raised several years after its registration, was an afterthought. In *Al-Jalal Enterprises Limited vs. Gulf Bank Limited (2014) eKLR*, the Court found that a challenge to the validity of a Charge at the time of the hearing of the suit was an afterthought. The court stated: -
- “ 16. Further, the absence of past allegations raised concerning the validity or otherwise of the charge gives the impression that the current allegations are an afterthought. This issue has been addressed by the Court of Appeal since 1966 where the Court has found no sympathy for debtors who after executing valid security instruments later turn around and challenge the validity years later when the bank commences the sale of the securities. In the present case, it is unconscionable to turn and purport to use any baseless excuse to frustrate the bank from realizing its security after it has lent money to the Plaintiff.”
26. I find that since both parties executed the Charge with appropriate attestations followed with due registration, the arguments against its validity are insufficient to overturn or challenge its enforceability.
27. Regarding the issue of interest, the plaintiffs contend that the loan was inflated with usurious interest rates, contrary to section 44A of the *Banking Act*. In contrast, the bank contended that a loan of Kshs 6,000,000/= was disbursed to the plaintiffs on 18/3/2011. That the applicable interest rate was 11.75% which was 1.75% below the bank's base lending rate at that time. The bank argued that, as per the Charge document, the bank reserved the right to vary the interest from time to time.
28. In the evidence presented, the Court notes that the bank took the initiative to inform the plaintiffs through a letter dated 15/12/2011. The contents of the letter indicated that, effective January 2012, the plaintiffs' installment amount would be increased by Kshs.111,673/- in line with the new base rate of 24%.The communication suggests that the bank adhered to its obligations to inform the plaintiffs about the changes in interest rates. Further, the Charge contained a provision that allowed variation of the interest.



29. Given these circumstances, the Court finds that the bank acted within legal parameters regarding interest charges and communicated the same to the plaintiffs. Therefore, there is insufficient evidence to support the claim of excessive or uncommunicated interest rates applied on the loan.
30. The next issue is whether the mandatory notices were issued. Section 96 of the Land Act outlines the obligations of a Chargee to issue notices to the Chargor before exercising the power of sale. The purpose of this section is to protect the rights of borrowers, ensuring that they are adequately informed about any impending actions that may affect their property. The section provides as follows:
- “ 1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.
- 2) Before exercising the power to sell the charged land, the Chargee shall serve on the Chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”
31. Compliance with section 96 of the Land Act is mandatory. Failure to issue these mandatory notices invalidates any subsequent actions taken by the Chargee.
32. It is not in dispute that the plaintiffs were granted a home loan facility amounting to Kshs 6 million. They initially made timely payments but eventually defaulted on the loan. In response to the default, a statutory notice dated 9/5/2013 was issued to them, detailing the nature and extent of their default. The notice demanded a total payment of Kshs. 6,959,522.75 which was the total amount due as of that date. It gave three months for the plaintiffs to rectify the default. The notice also warned that failure to comply would result in the realization of the Charge by the 1st defendant. The plaintiffs acknowledged receiving this statutory notice.
33. According to section 96 of the Land Act, if a chargor fails to rectify his/her default within the stipulated time, he/she is entitled to a 40-day notice under Section 96(2) of the Land Act. The plaintiffs admitted to receiving the 40-day notice. The same was posted on 27/9/2013. Since service by post is deemed to be effected within 7 days of posting. The same would be deemed to have started running from 5/10/2013. That notwithstanding, a physical copy was affixed at the premises on 26/9/2013. That one would start running on 27/9/2013.
34. It would seem however, that before the 40 day notice could expire, on 31/10/2013 Keysian Auctioneers issued the 45-day notification. That to this Court’s mind was a serious irregularity.
35. From reading the Land Act and the Auctioneers Act, a Chargor is entitled to a clear uninterrupted Notices of; 90days, 40days, 45 days and the 15 days for advertisement. The Legislature was very deliberate in putting these notice periods. The intention was to give a Chargor as much latitude as possible to exercise his/her right of redemption. Any infraction on this will not be tolerated by a Court of both equity and law.
36. To the extent that the 45days notice overlapped with the 40days redemption notice, the Court finds that any subsequent actions by the 1st defendant was irregular.
37. The other point of contention is the description of the property involved in these notices. While the Plaintiffs acknowledge receiving all required notifications, they dispute whether the property was accurately described.



38. The plaintiffs complained that the said 40day notice was in respect of LR No. 12875 and not their LR No. 129594. Further, the 45day notice be the Auctioneer was in respect of LR No. 12875 and not LR No. 19584. Even the advertisements and the Memorandum of Sale were in respect of LR No. 12875 and not 19594.
 39. With such notices referring to a different property from that of the plaintiff's, can it be said that there were proper notices, advertisement and sale of LR. No. 12594? I believe not. The misdescription was so material as it amounted to a misrepresentation.
 40. The Certificate of title confirms that the plaintiffs are the owners of property L.R. 209/19594. It is noted to be originally no. L.R. 209/12875/12. From D1Exh1 pg 16, the charged property is indicated as LR No. 209/19594. The title shows that L.R. No. 209/19594 was derived from L.R. 209/12875/12.
 41. The Letter of Offer described the physical address of Phenoma Estate Langata but did not include the I. R. number. However, the charge document correctly identifies the property as L.R. 209/19594. It would appear the notices issued pertain to the entire property.
 42. To the Court's mind, the misdescription of the property could have had a negative impact on the public auction. It is the Court's view that once a Chargee commences the exercise of the statutory power of sale, should at all times endeavour to give full and proper description of the affected property.
 43. As to the events of the day of public auction, there is conflicting testimonies of Pw2 and D2w1. It is not very clear whether the Court Order was actually served before the auction was over or not. Further, it is not clear whether the 3rd defendant was actually a bona fide purchaser who had no notice of the infractions of the 1st and 2nd defendant.
 44. Her conduct before and the filing of the suit points to the contrary. She was alleged by D2w1 to be associated with the Auctioneer. She did not pay the entire amount which she bid. The amount due to the bank was said to be slightly over Kshs.7m but she paid Kshs.8.5m and paid nothing thereafter from 2013 to the date of trial 2024. Several adjournments were granted to enable her appear and testify but she failed to.
 45. The totality of the evidence on record is that the 1st and 2nd defendant conducted an irregular auction which did not pass any title to the 3rd defendant. The plaintiffs have therefore proved their case to the required standard.
 46. As the Court contemplates making a determination, it is clear that the monies received from the 3rd defendant cleared the loan. The plaintiffs had a sum close to Kshs.7m due from them on the loan. It would be unjust to clear them and let them scot free. The best the Court can do is to invalidate the wrongs and leave the parties to be at par. It was confirmed at the trial that the plaintiffs were still in occupation and that the property had not been transferred.
 47. Accordingly, the orders that recommend themselves to the Court are that judgment is hereby entered for the plaintiffs against the defendants, jointly and severally in terms of paragraph cc) of the amended plaint and paragraphs a) and d) as prayed for in the alternative save that as far as d) is concerned, the claim for proceeds received from 3rd parties shall not apply. The plaintiffs will have the costs of the suit.
- It is so decreed.

SIGNED AT NAIROBI THIS 3RD DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE



DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

