



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC NO. 372 OF 2015**

**SAAD OTIENO .....PLAINTIFF**

**VERSUS**

**JAMES MUGA OGODA .....DEFENDANT**

**JUDGMENT**

By a plaint dated 20<sup>th</sup> March 2006 the plaintiff herein sued the defendant seeking for the following orders:

- a) A permanent injunction restraining the defendant, his managers, workers, servants and/or agents from in any way interfering with the plaintiff's and title No. **KISUMU/KORU/771**, his manager and workers until this suit is heard and determined
- b) Loss and damage as per paragraph 8 of the plaint
- c) Cost of this suit
- d) Interest on (b) and (c) at Court rates.

**PLAINTIFF'S CASE**

PW1 testified and stated that the suit property KISUMU/KORU/771 was previously registered in the name of one Joseph Adera Owiny who had charged it to National Bank of Kenya Limited to secure a loan of Kshs. 300,000/

It was PW1's evidence that on 17<sup>th</sup> September 2003, he saw a newspaper advertisement in the East African Standard Newspaper by Ms Jogi Auctioneers who were advertising for sale of the suit property whereby the chargee, National Bank of Kenya Limited was exercising its statutory power of sale by public auction due to the default of payment of the outstanding loan arrears by one Joseph Adera Owiny.

PW1 stated that on 3<sup>rd</sup> October 2003, he attended a public auction in Kisumu town where the suit property was to be sold and emerged the highest bidder. PW1 also stated that he was issued with a certificate of sale dated 3<sup>rd</sup> October 2003 by Ms Jogi Auctioneers.

It was PW1's evidence that the defendant herein had placed a caution on the suit property which prompted the National Bank of Kenya Limited to file ***Miscellaneous Application No. 4 of 2005 in the High Court at Kisumu*** seeking the removal of the said caution which was removed vide a ruling dated 17<sup>th</sup> February 2012, by Honourable Lady Justice Abdi Ali- Aroni. PW1 was issued with a title deed to the suit property on 5<sup>th</sup> May 2005 which he produced as an exhibit in court.

PW1 further testified he has been unable to utilize the suit land due to the defendant's interference with his peaceful possession by destroying trees on the suit parcel of land and or assaulting PW1's employees. PW1 also stated that in December 2008 when he took the sugar cane that he had harvested from the suit land to Kibos Sugar & Allied Company Limited, he was informed that he could not be paid as the defendant was the registered owner of the land according to their records.

PW1 produced the following documents as exhibits to prove ownership, namely, a copy of the advertisement notice, memorandum of sale by Ms Jogi Auctioneers, copy of the title deed to the suit property, copy of the official search, copy of the green card and proceedings in Kisumu High Court Miscellaneous Civil Application No. 4 of 2005.

PW1 therefore urged the court to allow the claim as prayed as he followed due process to acquire the suit property.

### **DEFENDANT'S CASE**

DW1 gave evidence and stated that he entered into a sale agreement in December 1994 with Joseph Adera Owiny for 11.85 acres at a consideration of Kshs. 885,000/ . That he was to pay Kshs. 150,000/ to the seller and Kshs. 200,000/ to National bank of Kenya to enable them get a discharge of charge

It was also DW1's testimony that National Bank of Kenya wrote a letter to him seeking for a further Kshs 350,000/ which he stated that he paid through his lawyers.

DW1 further stated that National Bank of Kenya Limited did not have any proprietary rights whatsoever to sell and/or transfer the aforesaid title as at 3<sup>rd</sup> October 2003 since the loan facility secured by the said title had been liquidated in full by 16<sup>th</sup> September 1995. Further that any purported sale by auction held on 3<sup>rd</sup> October 2003, on the instructions of National Bank of Kenya was not only null and void but also the subsequent title obtained thereto.

DW1 stated that he lodged a caution on the suit land but he was later informed that the same was removed vide a court order. That the plaintiff took possession in 2005 and harvested the cane that had been planted by DW1. DW1 also stated that he has never stepped on the suit land since 2005 as the court had issued an injunction restraining him from interfering with the suit land.

DW1 produced the following documents in support of his claim namely, a copy of a letter dated 16<sup>th</sup> June 1995 addressed to National Bank of Kenya, a copy of a letter dated 27<sup>th</sup> March 1995 addressed to National Bank of Kenya, a letter dated 16<sup>th</sup> March 1995, a copy of a sale agreement and a copy of letter dated 24<sup>th</sup> March 1995 from the National Bank of Kenya Limited.

DW1 therefore urged the court to dismiss the plaintiff's suit with costs.

### **PLAINTIFF'S SUBMISSIONS**

Counsel listed 3 issues for determination and submitted that the plaintiff has demonstrated that he is the registered owner of the suit land and relied on the provisions of section 26 of the Land Registration Act which stipulates that:

*Section 26 of the Land Registration Act, 2012 provides;*

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme*

Counsel cited the case of **GITWANY INVESTMENT LIMITED v TAJMAL LIMITED & 3 OTHERS [2006] eKLR** on the issue of sanctity of title. Counsel also cited Section 99 of the Land Act that offers protection to purchasers of properties sold in the exercise of the chargee's statutory power of sale. It provides as follows:

**(1)** This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

**(2)** A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

**(3)** A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way,

unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

Mr Maube relied on the case of **Amazing Tours and Travel Limited v Housing Finance Company Limited & 2 others [2020] eKLR** where the court held that:

*“On whether or not the 3<sup>rd</sup> defendant has been registered as the owner of the suit property, I find that the plaintiff’s proprietary rights to the suit property were extinguished at the fall of the hammer during the auction. My humble view is that the case before this court is not whether the 3<sup>rd</sup> defendant is the registered owner of the suit property but whether the 3<sup>rd</sup> defendant validly purchased the said property at the auction. Section 99 of the Land Act provides protection to purchasers of charged property in exercise of the chargee’s statutory power of sale as follows:*

*“This section applies to—*

*(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser;*

*(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.*

23. *I find that in the present case, all that the 3<sup>rd</sup> defendant did was to comply with the conditions of sale and after winning the bid. I therefore find that it enjoys protection under the Law. I am guided by the decision in Nationwide Finance Co. Ltd v Meck Industries Ltd, (2005) eKLR, wherein it was held as follows:*

*“The Applicant was an innocent purchaser at a public auction. There is no suggestion that the purchaser had any notice of any irregularity or impropriety in the exercise of the power of sale so as to lose the protection provided by Section 69B of the Transfer of Property aforesaid.”*

24. *Similarly, in Captain Patrick Kanyagia v Damaris Wangechi & Others, Civil Appeal No. 150 of 1993, the Court of Appeal held that:*

*“When does the title pass; putting it another way: when does the right of redemption vested in the mortgagor come to an end?... It is clear therefore that Muchemi’s equity of redemption came to an end when the Kanyagias signed the contract of the sale and not later. However, it is not in dispute that even registration of the title of the Suit Property in favour of the Kanyagia’s has also been effected”.*

25. *As I have already stated in this ruling the suit property was sold to the 3<sup>rd</sup> defendant at the auction and I find that the moment the 3<sup>rd</sup> defendant was issued with the Memorandum and Certificate of Sale, the sale of the suit property was perfected and actualized. That being the case, the plaintiff lost all the rights to the suit property and cannot purport to lease the same property to a third party.”*

Counsel submitted that the plaintiff has proved that he is the bona fide owner of the suit land and is therefore entitled to the orders sought in the plaint with costs.

## **DEFENDANT’S SUBMISSIONS**

Counsel reiterated the evidence of both parties and listed 3 issues for determination as follows:

- a) Whether the defendant was unreasonable in utilizing the property based on his agreement with the previous owner **JOSEPH ADERA OWINY** and National Bank of Kenya Limited.
- b) Has the defendant interfered with the plaintiff’s peaceful possession?
- c) Is the suit vexatious and incompetent?

On the first issue counsel submitted that the three essential requirements of a contract had been met by the defendant hence he was justified to utilize the suit land. Counsel relied on the case of **Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR** where the court stated that:

*“Where therefore parties reach an agreement on the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal*

*obligations and consideration.”*

On the second issue as to whether the defendant interfered with the plaintiff's peaceful possession of the property, counsel submitted that at the time the defendant took possession, no one else was using the property as Joseph Owiny had sold to him the land and the Bank was in the process of discharging the charge. That the defendant was not aware that the Bank had sold the property in an auction.

It was counsel's submission that it was in fact the plaintiff who had trespassed on the suit property. Counsel therefore urged the court to dismiss the plaintiff's claim with costs as it is vexatious and an abuse of the court process.

### **ANALYSIS AND DETERMINATION.**

The issues for determination in this case is who is the bona fide purchaser of the suit land, whether the plaintiff is entitled to mesne profits as claimed and whether the plaintiff is entitled to the orders sought for a permanent injunction together with costs.

On the first issue as to who is the bona fide purchaser between the defendant and the plaintiff. The plaintiff produced documentation to show the root of the title and the process he used to acquire the title to the suit land.

It should be noted that both the plaintiff and the defendant acknowledge that the suit land previously belonged to one JOSEPH ADERA OWINY and that the land was charged to National Bank Limited to secure a loan of Kshs 300,000/. It is also on record that the Bank exercised its statutory power of sale and sold the suit land in a public auction. The bank in exercise of its statutory power of sale, sold the suit property to the plaintiff herein in a public auction on 3<sup>rd</sup> October 2003.

The plaintiff submitted that he was an innocent purchaser for value without notice of any fraud or impropriety. As per the plaintiff's testimony and evidence on record, the action to purchase the suit property was based on the advertisement for sale advertised in the East African Standard Newspaper whereby the plaintiff emerged as the highest bidder which was duly accepted and was issued with a certificate of sale.

The plaintiff produced, a copy of the advertisement notice, memorandum of sale by Ms Jogi Auctioneers, copy of the title deed to the suit property, copy of the official search, copy of the green card and proceedings in Kisumu High Court Miscellaneous Civil Application No. 4 of 2005 to show the process which he followed to acquire the title.

Section 24 of the Land Registration Act No 3 of 2012, states that *the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.*

*Section 26 of the Land Registration Act, 2012 provides;*

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme*

The plaintiff's title having been procured procedurally is protected by law and is indefeasible as it is not tainted with any fraud or illegality. The defendant alleged to have bought the same parcel of land from the previous owner but did not complete the process. There was no evidence that the lawyer actually completed the process at the bank to enable them get a discharge of charge. There is further no evidence that a further amount of Kshs. 350, 000/ demanded by the bank was paid to the bank to complete the process.

The defendant has alleged that he made payments to the bank with the view of discharging the suit property but he has not tabled any evidence of payments made to the bank before the court.

The question is, why would the bank sell a property in a public auction while the loan has been repaid. The defendant's story is not adding up. The process of exercising the statutory power of sale is very elaborate which involves advertisement in a local daily and a valuation being done. The defendant claimed to have not been aware that the bank was selling the suit land which is not plausible if he had proprietary rights on the land. The defendant would therefore not qualify as a bona fide purchaser. In the case of **Lawrence Mukiri V Attorney General and 4 Others [2013]** the court defined a bona fide purchaser as follows:

*“...a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:*

*i. He holds a certificate of title;*

- ii. He purchased the property in good faith;
- iii. He had no knowledge of the fraud;
- iv. The vendors had apparent valid title;
- v. He purchased without notice of any fraud;
- vi. He was not party to any fraud;”

The plaintiff as opposed to the defendant fits the definition of a bon fide purchaser above. Further the defendant has not tabled any agreement before the Court to show that there was a valid contract between him, John Adera Owiny and the bank. The only agreement the defendant has produced is a copy of a sale agreement between himself and the said John Adera Owiny, which the court notes that it was neither dated nor properly executed.

The defendant in his statement of defence dated 3<sup>rd</sup> May 2007 makes allegations of fraud on part of the bank in the exercise of its statutory power of sale over the suit property. It is trite law that fraud requires a higher standard of proof. Not only must allegations of fraud be particularized but must also be specifically proved which was not the case when the defendant gave evidence. The defendant made the allegations against the bank who was not a party to this suit. If the defendant felt aggrieved by the actions of the bank, then he should have enjoined it as a party. That was not the case.

It is also worth noting that there was no complaint from the chargor, touching on the manner in which the suit property was sold. The charge over the suit property ranked in priority over the claims by either the chargor or by third parties.

Having considered the evidence on record I find that the plaintiff is an innocent purchaser for value without notice of any fraud or impropriety.

On the second issue as to whether the plaintiff is entitled to mesne profits, Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:

*“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;*

Order 21 Rule 13 of the Civil Procedure Rules provides as follows:

*13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—*

*(a) for the possession of the property;*

*(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;*

*(c) directing an inquiry as to rent or mesne profits from the institution of such suit until—*

*(i) the delivery of possession to the decree-holder;*

*(ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or*

*(iii) the expiration of three years from the date of the decree, whichever event first occurs.*

*(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.*

Mesne profits are special damages which not only need to be pleaded but also proved. In the case of **Njeri Kimani Vs Joseph Njoroge Murigi and others HCCC No. 819 of 2009**. It was held,

*“A claim for mesne profit is the nature of special damages, which require to be pleaded and strictly proved.”*

Similarly in the case of **Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR** stated as follows with regard to mesne profits:-

*“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act. The said provisions state as follows with regard to a decree for*

possession and mesne profits:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

a. For the possession of the property.

b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.

c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-

i. The delivery of possession to the decree-holder

ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or

iii. The expiration of three years from the date of the decree, whichever even first occurs.

(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

*The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”*

The plaintiff pleaded at paragraph 8 of the plaint for loss of sugar cane profits of Kshs. 300,000/ per year that he would have planted but did not go ahead to prove the same. He did not lead any evidence to prove how he arrived at that figure I find that the claim for loss of use of the land has not been proved and therefore it fails.

Having found that the plaintiff holds a valid title to the suit property and is the lawful owner of the suit property, it follows that the plaintiff is entitled to the following specific orders:

a) A permanent injunction is hereby issued against the defendant restraining him, his servants, agents, employees, assigns or anybody acting on his instructions from entering, remaining in, fencing off, demarcating, transferring or in any way dealing with land parcel of land known as KISUMU/KORU/771.

b) Costs of this suit shall be borne by the defendant.

**DATED and DELIVERED at ELDORET this 6<sup>TH</sup> OF MAY , 2021**

**M. A. ODENY**

**JUDGE**