



**Rayat Trading Co Limited v Bank of Baroda & another (Civil Suit 14 of 2011)  
[2024] KEHC 1306 (KLR) (Commercial and Tax) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1306 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 14 OF 2011  
A MABEYA, J  
FEBRUARY 16, 2024**

**BETWEEN**

**RAYAT TRADING CO LIMITED ..... PLAINTIFF**

**AND**

**BANK OF BARODA ..... 1<sup>ST</sup> DEFENDANT**

**TETEZI HOUSE LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide an amended plaint dated 24/10/2014, the plaintiff sought judgment against the defendants, jointly and severally, for a permanent injunction to restrain them from interfering with the suit property LR No 209/4460. The plaintiff also sought for a declaration that the sale and transfer of the suit property to the 2<sup>nd</sup> defendant was fraudulent and be transferred back to it. Damages for loss of property and rental income of Kshs. 44,104,000/- and loss of future income together with general damages were also sought.
2. The plaintiff's case was that it was the registered owner of the suit property and on 4/9/2007, it applied for a facility from the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant approved three facilities viz, an overdraft of Kshs. 5m, a term loan of Kshs. 10m and a short-term loan of Kshs. 2.7m, respectively. The facilities were secured by a legal charge over the suit property. That the 1<sup>st</sup> and 2<sup>nd</sup> defendant transferred the suit property to the 2<sup>nd</sup> defendant without the plaintiff's knowledge.
3. The plaintiff contended that the defendants were fraudulent since the 1<sup>st</sup> defendant did not serve any demand for any outstanding money, the statutory notices, notice of redemption and notice of sale from the auctioneer. That there was no advertisement for sale at a public auction and that the property was sold at an undervalue for Kshs. 18m. That on 19/1/2011, the 2<sup>nd</sup> defendant served an eviction notice threatening to evict the plaintiff's tenants.



4. The 1<sup>st</sup> defendant (“the bank”) filed its amended statement of defence dated 21/10/2014 in opposition to the suit. It contended that the plaintiff had obtained overdraft facilities for Kshs 17,700,000/- which were secured by the suit property. That the plaintiff did not discharge its obligations under the facilities. That the demand for payment of the outstanding was served upon the plaintiff and the statutory notice was served in accordance with the law. That the suit property was sold under private treaty at the best market value.
5. It was the bank’s case that the equity of redemption was extinguished since there was a valid and binding agreement in favour of the 2<sup>nd</sup> defendant. It made a counterclaim against the plaintiff for an alleged outstanding sum of Kshs. 7,329,014.15 together with interest and general damages.
6. The bank contended that the plaintiff had breached the credit facility contract entered on 4/9/2007 as a result of which, the plaintiff fell into arrears of Kshs. 34,558,116.75 inclusive of bank charges. That it exercised its rights under the ITPA and sold the property via private treaty for Kshs. 18m leaving a balance of Kshs. 5,608,659.25. That the cumulative loan amount was Kshs. 22,165,026/- which was offset by erroneous interest of Kshs 8,425,201/-. That the plaintiff paid Kshs 803,951.60 leaving a balance of Kshs 7,329,014.15.
7. The 2<sup>nd</sup> defendant filed its amended defence and counterclaim dated 11/11/2011. It contended that the sale of the suit property had met all the legal requirements and at the time of the transfer of the same, the plaintiff was not in possession. That the plaintiff’s right of redemption was extinguished upon sale to the 2<sup>nd</sup> defendant and subsequent transfer.
8. The 2<sup>nd</sup> defendant made a counterclaim against the plaintiff for a mandatory injunction for the plaintiff to pay a monthly sum of Kshs. 3m from 1/1/2011 until the date of full payment. It also sought an injunction to restrain the plaintiff from collecting rent from the suit property and for the 2<sup>nd</sup> defendant to take possession of the suit property
9. It was contended that the plaintiff had been collecting rent amounting to Kshs. 300,000 monthly from the tenants thus denying the 2<sup>nd</sup> defendant in the main suit from income.
10. The hearing commenced on 21/5/2019 before Justice Mary Kasango. PW1 Guinbhash Sing Rayat relied on his witness statement dated 6/6/2018 in his examination in chief. He testified that the bank gave a facility to the plaintiff which the plaintiff was duly servicing. That the plaintiff never received any notice demanding the balance neither was there a statutory notice for the sale of the property.
11. He did a search and was informed that the property had been sold to the 2<sup>nd</sup> defendant and upon enquiry at the post office, he was informed that the letter was returned to the sender for non-collection. He further observed that the sale was fraudulently done with collusion between the bank and the purchaser and the property was sold at an undervalue.
12. He only learnt of the sale when three people visited his office. That in 2007, the property was valued at Kshs. 21m yet it was sold for only Kshs. 17m. He confirmed that he did not receive any communication for the sale of the property and the 2<sup>nd</sup> defendant bought the property through private treaty. He stated that if he was informed of the impending sale, he would have sold the property at market value and still remained with some money.
13. In cross examination, he admitted that he was aware that if he did not comply with the contract, the property would be sold by the bank. That the Post Office box number belonged to him and he was under an obligation to routinely check on the same.



14. PW2 Francis Gikonyo confirmed that he worked at the Post office. That the demand letter by the bank was received at the post office but remained unclaimed for two months. After that, it was sent back to Mwaura Wachira advocates who had sent it.
15. DW1 Collins Ngetich was the bank's witness. He relied on his witness statement dated 2/5/2019 and produced the bank's bundle of documents as D1Exh1. He testified that the plaintiff had defaulted in servicing the facility and the bank demanded payment but there was no response. That the bank decided to sell the property through private treaty and a valuation was conducted. That the property was sold for Kshs. 18,000,000/- leaving a balance of Kshs. 4,516,471/-.
16. In cross examination, he stated that the amount of due as at the time of default was Kshs. 24.58m and after deductions, the amount due was Kshs 7.3m together with interest.
17. DW2 John Maina Mburu adopted his witness statement dated 16/05/2011 and supplementary witness statement dated 19/4/2018, respectively as his evidence in chief. He produced the bundle of documents dated 16/05/2011 and 19/4/2018 as D2Exh1 and 2, respectively.
18. He testified that he made physical visits to the property and there were no protests. That he learnt of the property via an auctioneer who had been requested to advertise the property. That the property was sold at the market price via private treaty.
19. The plaintiff submitted that, from the pleadings, it was evident that the plaintiff never received notice of sale and the letter supposedly send by the bank was returned to the sender. It was submitted that by failing to give notice, the bank had contravened section 69A of the [Transfer of Property Act](#) 1882 (now repealed).
20. It was further submitted that, sale by private treaty was not the first option available to the bank and the same was done to deprive the plaintiff of its property. That that the bank did not inform it of the sale and only got to know about it after demand for vacant possession was made. It was the plaintiff's submission that the sale was unlawful and was done in collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendant. The plaintiff termed the sale as fraudulent and urged the court to declare the sale illegal.
21. It was submitted that the plaintiff had lost rent amounting to Kshs. 21,888,000/- as well the value of the property estimated at Kshs. 40,000,000/-. As to whether the plaintiff owed the defendant the debt, Counsel submitted that the plaintiff did not owe the defendant any amount since the defendant did not explain how the amount claimed was arrived at and that there were discrepancies in the figures given.
22. The bank submitted that the plaintiff's failure to collect the notice from the Post Office Box address was his own fault and could not invalidate the service. That by giving notice via the post, the same validated the sale. That further, by selling via private treaty, the bank was well within its rights as stipulated under section 69 of the [Transfer of Property Act](#) 1982.
23. That the plaintiff was not entitled to damages or any other relief. It was further submitted that, the disparity in the pleadings did not invalidate the bank's claim as it only amounted to a clerical error.
24. The 2<sup>nd</sup> defendant submitted that the burden of proving collusion between the defendants was on the plaintiff who had not discharged the same. Counsel submitted that the defendant was not obliged to sell by public auction.
25. I have considered the pleadings before court, the evidence adduced and the written submissions by the parties. The first issue is with respect to the legality of the sale of the suit property.



26. On the first aspect of statutory notice, it is not disputed that the bank did send the notice via Post Office on the number provided in the security documents. The same was returned after two months unclaimed. This position was confirmed by PW2 who testified that the letter did not reach the plaintiff as it was returned to the sender.
27. In the circumstances, was there a valid statutory notice issued to the plaintiff? The bank's position was that it discharged its duty by sending the notice to the plaintiff's registered post office box number. On his part, the plaintiff contended that since the notice was returned unclaimed, he cannot be said to have received the notice.
28. The view the Court takes is that, once the notice was returned unclaimed, the defendant should have made more effort to contact the plaintiff. It was not enough to assume that since the notice had been issued, the bank's obligation to serve the statutory notice was discharged. The bank should have done more than that. No attempt was made to effect service eg. by personal service at the suit property.
29. Section 69A (1)(a) of the *ITPA* (repealed) stipulated that: -
- “ A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or part thereof, for three months after such service...”
30. The importance of a statutory notice cannot be gainsaid. It is meant to give the borrower an opportunity to redeem his property by paying the amount due or finding a way of restructuring a loan. The requirement for service of the statutory notice is couched on mandatory terms. This is because it is the first step to a borrower losing his property and/or having his equity of redemption extinguished.
31. Indeed, the evidence on record show that the plaintiff was oblivious that it had lost its property until it was confronted with eviction. The matter is compounded by the fact that the bank resorted for sale by private treaty rather than attempting public auction first. Although sale by private treaty is permitted, it is not to be the first option. This is because the same is open to abuse and “arranged sales” to the extreme prejudice of the borrower. A lender must first attempt sale by public auction before resorting to sale by private treaty.
32. In *Mosioma v Housing Finance Co. of Kenya Ltd & 3 Others* [2021] KEHC 72 (KLR) it was held:-
- “In *Sharok Kber Mohammed Ali & Another v Southern Credit Banking Corporation Limited* [2008] eKLR, Warsame J, as he then was, held of sale by private treaty:-
- “ As stated earlier the rule against clogging or fettering the equity of redemption relates to the very essence of an equitable right to redeem the mortgaged property. The right to redeem a charged mortgaged property cannot be fettered or clogged by any stipulation other than under the right procedure. I think the procedure adopted by the bank is in contravention of the law and equity. In HCCC No. 265 of 2000 *Joseph Siro Mosioma v H.F.C.K & 3 Others* I addressed my mind as to whether financial institutions had powers to sell up a charged property by a private treaty. In that ruling I stated that the bank officials and/or agents in selling a property by private treaty must address their minds to the drastic effects of depriving the owner of the charge property. My position was the banks are required to give a fair amount of time and/or notice in addition to giving the mandatory statutory notice under the relevant laws before an attempt to sell



the property by private treaty is endeavoured. I also deprecated the practice of banks rushing to sell the charged or mortgaged properties through private treaty without giving adequate notice and without attempting to sell the same by public auction. It was my view in that ruling that there cannot be any sale by private treaty when there has been no previous attempts to sell the subject property by public auction. In my humble view there must be evidence or attempts to sell the charged property through a public auction which failed either through a conduct of the borrower or some other issues relevant to the case."

I reiterate my position in that ruling that a mortgage cannot at his convenience deal with the mortgage property in the manner he deems fit by resorting to sell by private treaty at a first instance. The right to sell by private treaty is not availed and cannot be exercised by the mortgagee unless and until the mode of public auction has been attempted but failed due to the conduct of the borrower, where a chargee resorts to sell by private treaty without attempting to sell by public auction the resulting transaction would be void ab initio. In this case the bank purported to sell the suit property through a private treaty before it had given the mandatory statutory notice required under section 69A of *I.T.P.A.*, and without attempting to sell by public auction. That was absolutely illegal and in contravention of the clear provisions of section 69A of *I.T.P.A.* I make a finding that an illegal transaction cannot be a basis to confer a right on a third party especially like the present defendant whose conduct is somewhat suspicious."

I associate myself fully with the foregoing view. It is clear that the intention of the law on exercise of statutory power of sale is to give the chargor as much latitude and time as possible to exercise his equity of redemption. Indeed, after the statutory notice of sale, there is another notice that has to be given in case of sale by public auction under the *Auctioneers' Rules*. That notice is meant to give a chargor as much time as possible to exercise the right of redemption. Resorting to sale by private treaty as a first resort deprives a chargor that extra period that is available in public auction.

Further, by subjecting a property to public auction, there is an opportunity of getting the best possible price as would be dictated by the market forces as opposed to private treaty. In private treaty, the price is set by the chargee and the purchaser and deprives the realization of the best price for the charged property.

In any event, private treaty is open to abuse. The chargee may collude to dispose of the charged property to a pre-determined purchaser thereby defeating the equity of redemption. With public auction, the reserve price is usually advertised and there is transparency in the process. This is not so with private treaty which is usually secretive and opaque.

I therefore hold that notwithstanding that there is no requirement or order of exercising the rights under section 69A of the *T.P.A.*, a chargee must first attempt public auction before resorting to private treaty.

In the present case, by resorting to private treaty in a discreet and opaque manner before attempting public auction, the 1<sup>st</sup> defendant acted fraudulent."

33. In view of the foregoing, the question that arises is what remedy is the plaintiff entitled to. In this case, section 69B of the *ITPA* does apply. It provides:-

"69B.



- (1) A mortgagee exercising the mortgagee's statutory power of sale shall have power to transfer the property sold for such estate and interest therein ...
- (2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-
  - (a) that no case had arisen to authorize the sale; or
  - (b) that due notice was not given; or
  - (c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."

34. In *Nancy Kaboya Amadiwa v Expert Credit Limited & Another* [2015] eKLR the court pronounced itself as follows;

"We find it necessary to consider the remedies available for sale arising out of a non-valid statutory notice. We restate that a mortgagor who has been prejudiced by a defective auction can only be remedied in damages. This is both under *RLA* and *ITPA*. Ringera J in *David Ngugi Mbutia v Kenya Commercial Bank and Another* (HCCC No. 304 of 2001) Unreported set the principle thus: a person damnified by a transfer of property by mortgagee to an auction purchase pursuant to any irregular or improper exercise of statutory power of sale is entitled to recover any damages directly suffered by him from the auctioneer. The same judge restated the position in *Hilton Walter Osinya and Saving and Loan (K) Ltd and another* (HCCC No.274 of 2001) Unreported. We agree with the above observation of Ringera J (as he then was)."

35. Further in *Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others* [2020] eKLR the Court of Appeal held that;

"In our view, there was nothing sinister therefore with the Bank proceeding by way of private treaty. The irregularities complained of which arose in the cause of the sale should be equated to irregularities arising at a public auction. As stated in the *Amadivacase (supra)*, if the sale was improper, or caused prejudice to the mortgagor, then in our view, the recourse lay in damages and not in cancellation of the Title Deed. In any event, even if the Court was minded to cancel the 3rd respondent's Title Deed, then it should have been restored to the position before the sale, and not revert it to the 1st respondent who had not cleared the loan with the Bank"

36. From the foregoing, it is evident that the plaintiff's equity of redemption was extinguished once the property was sold to the 2<sup>nd</sup> defendant. The plaintiff and the 2<sup>nd</sup> defendant had no contract therefore



the plaintiff could not sustain a claim against the 2<sup>nd</sup> defendant. The plaintiff is not the legal owner of the suit property and the only remedy available is damages. The amount suffered according to the plaintiff is Kshs. 44,104,000/=. Considering the value of the property was Kshs. 40M and the amount the due on the loan was Kshs. 18M. The damages awarded will be Kshs. 22 million.

37. With respect to the 1<sup>st</sup> defendants counterclaim, the 1<sup>st</sup> defendant made a claim for Kshs 7,329,014 being the alleged outstanding amount of the facility. From the bank statement in D1Exh1 the amount debited is Kshs 8,039,000/=. In cross examination, D2W1 was not clear on how the bank arrived at that figure and thus was unable to substantiate the claim. On one hand, the claim is for Kshs.7,329,014/= which however does not appear on the bank statement. The 1<sup>st</sup> defendant has therefore failed to prove its claim against the plaintiff.
38. In the upshot, the Court finds that the plaintiff has proved its case on a balance of probability and enters judgment accordingly as follows:-
- a. A declaration is hereby issued that the sale of the Land parcel known as 209/4460 was unlawful and irregular.
  - b. That the plaintiff is hereby awarded damages amounting to Kshs. 22 million together with interest at court rate from the date of this judgment until payment in full.
  - c. The plaintiff is awarded costs of the suit to be borne by 1<sup>st</sup> defendant.
  - d. The 1<sup>st</sup> defendant's counterclaim is hereby dismissed with costs.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. MABEYA, FCI Arb, EBS**

**JUDGE**

