



REPUBLIC OF KENYA



**Kariuki & 2 others v K-Rep Bank Limited & 5 others (Civil Suit 371 of 2009)
[2024] KEHC 3743 (KLR) (Commercial and Tax) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 371 OF 2009
A MABEYA, J
APRIL 19, 2024**

BETWEEN

**ELIZABETH WANJIKU KARIUKI 1ST PLAINTIFF
PAULINE NJOKI KANGI 2ND PLAINTIFF
ANNE JULIA WAMBERE KANGI 3RD PLAINTIFF**

AND

**K-REP BANK LIMITED 1ST DEFENDANT
PETER KINYANJUI MUKOMA 2ND DEFENDANT
NANCY WAMBUI NJUGUNA 3RD DEFENDANT
JOSEPH MURIITHI MIANO 4TH DEFENDANT
PETER GACHIE T/A REGENT AUCTIONEERS LIMITED 5TH DEFENDANT
THE LAND REGISTRAR 6TH DEFENDANT**

JUDGMENT

1. The plaintiffs instituted the suit against the defendants vide an amended plaint dated 3/7/2009. They sought judgment barring the defendants from dealing with the 1st and 2nd plaintiff's properties and a declaration that the charge dated 17/1/2007 was invalid and therefore not binding or enforceable. They further prayed for a declaration that the 1st defendant do deliver up the original documents of title and that the sale of the property was invalid.
2. Their case was that the 1st plaintiff was the registered owner of the suit properties known as Nairobi/Block/69/117/26 unit 26 and 149, Nairobi/Block/69/117/48 unit 48 and 149 and Nairobi/



- Block/69/117/9 unit 9 and 148. That the 2nd plaintiff was the registered owner of Nairobi/Block /69/117/9 unit 9 and 148 (all collectively referred to as “the suit properties”).
3. The 1st and 2nd plaintiff received a facility of Kshs 7,400,000/- and a charge was registered against the suit properties on 25/1/2007. According to the plaintiffs, the said charge was null and void for it did not comply with the provisions of the Registered Land Act Chapter 300 (repealed).
 4. The plaintiffs contended that they did not sign the Charge as they were outside the country at the time of execution thereof. That the 1st defendant had commenced the process of selling the properties without issuing the prerequisite notices. That the sale of the property at an auction on 26/5/2009 was unlawful since the defendants did not pay 25% of the purchase price to the 1st defendant at the fall of the hammer and the remaining 75% within a month. They further contended that the sale was not a public auction as the 5th defendant entered into private treaties.
 5. The 1st defendant filed its statement of defence dated 16/3/2010. It contended that the 1st and 2nd plaintiff had offered the suit properties as security for Kshs 7,400,000/-. That the Charge document was executed by all the parties and met the mandatory requirements of section 65(1) of Registered Land Act. That the beneficiaries appeared in person before the advocates and identified themselves by their ID Numbers. That the auction took place on 26/5/2009 where the sale took place.
 6. The 3rd defendant filed her amended statement of defence and counterclaim on 12/2/2014. She pleaded that she attended a public auction on 26/5/2010 and presented her bid for Nairobi/Block /69/117/ unit 26 which was successful. That the deposit was paid at the fall of the hammer and the remaining balance as per the conditions of sale.
 7. In the counterclaim, she stated that she was entitled to possession of the property together with rental income from the date of full payment of the suit premises. She prayed for judgment to be entered against the plaintiffs for loss of mesne profits from 26/5/2009.
 8. The 4th defendant filed an amended defence and counterclaim dated 7/6/2016. He contended that he attended an auction that was conducted by the 5th defendant and successfully bid for the property known as Nairobi/Block/69/117/9. That a deposit of Kshs 650,000/- was paid and later a further Kshs. 1,950,000/- was transferred to the 1st defendant.
 9. In the counterclaim, he contended that he was the rightful owner of Nairobi/Block/69/117/9. He sought judgment against the 4th defendant for Kshs 1,600,000/- being rental income for 64 months from 31/8/2010 to 15/3/2016 and future rent or mesne profits at the rate of 25% per month from 15/3/2016 to the date of eviction.
 10. The 5th defendant filed the statement of defence dated 7/12/2017. He stated that he conducted an auction on 26/5/2010 and the 2nd 3rd and 4th defendant paid a deposit of 25% of the purchase price. That the balance of the purchase price was paid to the 1st defendant within 30 days. He contended that the public auction was lawful.
 11. The hearing commenced on 28/5/2019 before Kasango J. The 1st plaintiff, Elizabeth Wanjiku Kariuki, testified on her own behalf. She adopted the witness statement dated 20/2/2017 as her evidence in chief. She testified that she owned two properties, that is, Nairobi block 6711726(149) and Nairobi block 6911748 and were charged to the 1st defendant. That her address was not in the Charge document prepared by the Bank. That the two names in the Charge document were the beneficiaries. That the address on the statutory notice by registered post was not her postal address so she did not receive the mail.



12. In cross examination, she told the Court that the two beneficiaries, 2nd and 3rd plaintiff, were her aunt Pauline and mother Ann Julia. That she signed the Charge freely yet she did not complain that the address on the Charge document was not her postal address. She stated that the evidence showed that the statutory notice addressed to the plaintiffs was posted but she did not receive it. That the two properties have not been transferred yet. She testified that at the time of executing the Charge, she did not tell the bank that she lived in Australia or given them her Australian address.
13. PW2 Pauline Njoki Kangi relied on her witness statement dated 20/2/2019 and admitted having signed the Charge document dated 17/1/2007. She stated that she did not see the advert or receive any notification of sale. She admitted being served with the statutory notice but she did not comply with it.
14. In cross examination, she stated that she was alerted by her lawyer the day before the sale. That she was not informed by the bank on time as she was served with the statutory notice on 7-11-2008. That she executed the Charge to help her sister get a loan from the bank and she got to know of the sale on May 25, 2009. That she lived in one of the properties since 31/8/2008 and in the apartments the rent was Kshs. 25,000/- per month.
15. The Defence hearing commenced on 24/7/2019 when James Karanja testified as DW1. He was the manager of Sidian Bank formerly K-REP Bank Limited. He adopted the witness statement dated 12/4/2017 as his evidence in chief and produced the bundle of documents dated 12/4/2017. He confirmed that the loan was borrowed by the 3rd plaintiff and the 1st and 2nd plaintiff offered their properties as security.
16. He testified that there was no postal address after the name of the 1st plaintiff in the Charge document and that in the statutory notice, the address was 8416 -00200. That no notice was sent to Paul Warui and Joselene because they had given consent to 1st plaintiff to deal with the bank. He stated that service was done through the known post.
17. That the 3rd plaintiff confirmed receipt of the notice but the 1st and 2nd plaintiff did not. The letter from the auctioneer had been addressed to the 3rd plaintiff and the 45 days redemption notice was served on Mr. Ndegwa husband of Pauline Njoki the 2nd plaintiff. There was no evidence of service of notification of sale to any of the parties other than 2nd plaintiff's husband.
18. He testified that it was not clear the amount outstanding against the 3rd plaintiff as the statement of account was not produced and the payments by the 3rd plaintiff had not been produced in Court. That the documents filed in Court did not contain the 3rd plaintiff's name and that the cheques given by the buyers did not amount to Kshs. 7,850,000/- as 30 days later there was a shortfall.
19. DW2 Peter Gachie who was the auctioneer adopted the witness statement dated 18/2/2019 as his evidence in chief. He testified that he confirmed the successful bidders as the 3rd, 4th and 5th defendant. That after the sale, he received 25% from all the buyers which amount he forwarded to the bank. That the property was advertised on 22/5/2009 and the auction was on 26/5/2009.
20. DW3 Nancy Wambui Njuguna adopted her amended statement dated 27/11/2015 and produced the bundle of documents dated 4/11/2015 as an exhibit. She stated that there were other people in the auction including Joseph Miano. She confirmed that she paid Kshs. 1,950,600/- on 26/6/2009. That she was given the original title and transfer documents but she had never taken possession of the property.
21. DW4 Joseph Miano adopted his witness statement dated 11/12/2015 as his evidence in chief and relied on the bundle of document dated 16/6/2016. He testified that he paid the balance of the purchase price on 26/6/2009.



22. The plaintiffs submitted that the Charge to the 2nd defendant was informal as it was not registered and therefore it did not pass any legal or equitable interest. Counsel submitted that the statutory power of sale had not crystalized as the 1st defendant failed to send the requisite notices as the address on the registered post belonged to the 3rd plaintiff only. That the advertisement for sale contained an error as the property therein was listed as belonging to Paul Njoki Kangi.
23. For the defendants, it was submitted that the allegations that the Charge was defective should be disregarded as it was raised at the submission stage. That unit 26 and 149 were legally registered therefore granting the bank all the rights. On the validity of the Charge, it was submitted that the lack of the signature on the acknowledgement section did not invalidate the Charge with regard to section 74 of the *Registered Land Act*.
24. It was further submitted that the statutory notice was sent to the plaintiffs via registered post in an address they had provided in the Charge. That the notification of sale was issued through the 5th defendant and the 1st defendants right to exercise its statutory power of sale had crystalized. That the auction was lawfully conducted
25. I have considered the pleadings, the evidence in on record, the written submissions and the authorities cited by Learned Counsel. The first issue for determination is whether the statutory power of sale had crystalized.
26. It is not in dispute that the 3rd plaintiff was indebted to the 1st defendant. The 1st and 2nd plaintiffs offered their properties as security and the 1st defendant registered a Charge against them. On default, the 1st defendant offered them for sale and the same were sold to the 2nd 3rd and 4th defendant. This suit was instituted by the plaintiffs arguing that the sale was irregular for reasons that the 1st defendant failed to comply with the procedural steps before offering the property for sale.
27. The first issue raised by the plaintiffs was the service of the statutory notices. The 1st plaintiff stated that the statutory notice was served upon postal address number 8416 -00200 that did not belong to her as she lived abroad. On its part the 1st defendant stated that the said postal address was given by the parties on the Charge and that the 1st plaintiff did not state that she did not live in the country.
28. Section 74 of the *Registered Land Act* (RLA) Cap 300 provides as follows: -

“

- “(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.
- (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub section (1) the chargee may -:
 - (a) appoint a receiver of the income of the charged property, or
 - (b) sell the charged property.

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that sub section”



29. From the foregoing, the 1st defendant was under an obligation to serve all the plaintiffs with the requisite statutory notice before the sale. The 1st defendant attached certificate of postage showing that it had sent the notice via the postal address was 8416-00200. It is not denied that this address belonged to the 2nd and 3rd plaintiff as per the Charge. In this regard, there was prima facie evidence that the 2nd and 3rd plaintiff were properly served.
30. With respect to the 1st plaintiff, the Charge instrument did not contain her address of service. The postal address 8416-00200 was only signed against the 2nd and 3rd plaintiffs. Her testimony was that she lived abroad and therefore was not aware of the sale. The properties Nairobi block 6711726(149) and Nairobi block 6911748 belonged to her and they were part of the Charge. Both the bank and the 1st plaintiff were well aware that the 1st plaintiffs address was not on the Charge document. In this regard, there was no evidence that the 1st plaintiff was ever served with the notice.
31. What then is the consequence for non-service? In *Nyangilo Ochieng & Another v Fanuel B. Ochieng* Civil Appeal No. 148 of 1995 the Court of Appeal held: -
- “It is trite that before a chargee can exercise his/her/its statutory power of sale, there must be compliance with section 74 (1) of the *Registered Land Act* (Cap 300, Laws of Kenya) This section obliges the chargee to serve, by registered post, the relevant statutory notice..... It is for the chargee to make sure that there is compliance with the requirements of section 74 (1) that burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that such notice was in fact sent.”
32. In *Stephen Boro Gitiba v Nicholas Ruthiru Gatoto & 2 others* [2017] eKLR, the Court of Appeal held as follows: -
- “The case at hand is on all fours with that decision in (*Ochieng and Another v Ochieng and Others*, Civil Appeal No. 148 of 1995 EALR (supra) and the conclusions the learned Judge arrived at were therefore correct in law. Section 74(1) of the *RLA* was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, and incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title. The learned Judge was right to find and hold that innocence of Gitahi’s purchase was not curative of the fundamental”.
33. In view of the foregoing, I hold that the legality of the sale is dependent on the validity of the statutory notices sent out by the bank and the auctioneer. Despite the 2nd plaintiff being alleged to have been served with the statutory notice, there is no evidence of her receipt of any other notice of sale by the auctioneer. The banks assertion was that the service was effected to a third party who was not even a party to these proceedings.
34. The purpose of the notice is to ensure that a borrower and/or a chargor are given an opportunity to redeem themselves by paying out the debt and saving their property. Section 74 of the *Registered Land Act* made it mandatory for the 1st defendant to issue the notices before effecting the sale. By failing to do so, the Court finds that the statutory power of sale had not crystallized. I find that the plaintiffs had made out a case that the sale was therefore irregular for want of notices.



35. In this regard, I find that the sale to the 2nd, 3rd and 4th defendants was premature and no genuine title was transferred to them. The 1st and 5th defendants were obliged to adhere to the law before purporting to exercise the statutory power of sale. The Court also notes that the bank being the custodian of the bank statements, did not provide the Court with the actual status of the debt owed. DW1 confirmed that the actual statement was not before the Court and the 3rd plaintiff had actually made payments towards repayment of the loan.
36. In this regard, I find that having found the sale to be irregular, the 2nd, 3rd and 4th defendants' counterclaims for rental income fails. The bank is entitled to its money but this can only be obtained upon adhering to due process.
37. Accordingly, I find that the plaintiffs have proved their case to the required standard and accordingly enter judgment in their favour in the following terms: -
- a. A declaration is hereby issued that the sale of the suit properties known as Nairobi/Block /69/117/26 unit 26 and 149, Nairobi/Block/69/117/48 unit 48 and 149 and Nairobi/Block /69/117/9 unit 9 and 148 on 26/5/2009 or any other time was illegal and unlawful and is hereby set aside
 - b. The 1st defendant is at liberty to recover the amount owing from the plaintiff upon issuing the requisite notices in accordance with the law.
 - c. The 2nd, 3rd and 4th defendants suits by way of counterclaim against the plaintiffs are dismissed. They are at liberty to seek refunds from the 1st defendant of whatever monies they paid to it.
 - d. Although the plaintiffs succeeded in their suits, their default in loan repayment led to the consequences that followed. I will therefore order that each party to bear own costs of the suit.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE

