



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kenya Commercial Bank Limited v Amunga (Civil Appeal  
132 of 2019) [2023] KEHC 87 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 87 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL 132 OF 2019  
FA OCHIENG, J  
JANUARY 17, 2023**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ..... APPELLANT**

**AND**

**JAPHETH AMUNGA ..... RESPONDENT**

*(Being an appeal from the decision of the Principle Magistrate Hon. Mr. C. L. Yalwala dated and delivered on 15th May, 2018 in the original trial in Kisumu Chief Magistrate's Environment and Land Case No. 11 of 2017 (formerly Kisumu Chief Magistrate's Civil Case No. 415 of 2002))*

**JUDGMENT**

1. The appellant has challenged the decision of the trial court which had ordered it to refund the sum of Kshs 180,000/= which the respondent had allegedly paid to the appellant's agent, Ms Odambo Auctioneers. The appellant denied having been a party to the transaction between the auctioneers and the respondent.
2. By way of a brief background, the respondent had testified that he paid the sum of Kshs 180,000/= to Odambo Auctioneers. The payment was in respect of the purchase price for the following 3 properties:  
-
  - i. LR No East Gem/gongo/543;
  - ii. LR No North Marama/inaya/30; and
  - iii. LR No Kisa/doho/99 and 151.
3. The respondent's case was that the 3 properties had been charged to the appellant.



4. It would appear that when the borrower (who was not identified in the proceedings) defaulted in payment of money owed to the appellant, the properties were put up for sale by way of a public auction. The respondent attended the auction, and was declared the highest bidder for all the 3 properties.
5. It was his case that he first paid Kshs 60,000/= as a deposit, on the date of the auction. Thereafter, he paid Kshs 120,000/= on March 29, 1993, which was 17 days after the auction date.
6. The respondent provided the trial court with the 2 receipts and the certificate of sale which had been issued by the auctioneer. After the respondent testified, the appellant closed its case, without calling any witness.
7. Thereafter, the parties made their respective submissions. The learned trial magistrate rejected the appellant's submissions. The trial court expressed the view that the respondent herein had not made it known to the court what the status of the parcels of land was.
8. In those circumstances, the court believed that it was prudent not to order that the parcels of land be transferred to the respondent. Instead, the trial court ordered that the money which the respondent had paid to the auctioneer, be refunded to the respondent.
9. Being the first appellate court, I am obliged to re-evaluate all the evidence on record. I will carry out that exercise, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses when they testified.
10. In order to place the re-assessment of the evidence in its proper context, I am obliged to start by summarising the pleadings. In the plaint, the plaintiff said that he did purchase the 4 parcels of land at an auction which was held on March 12, 1993. It was his case that the defendant was a chargee in respect of the 4 parcels of land.
11. Accordingly, the auction was conducted pursuant to the defendant's statutory power of sale.
12. Having remitted payment of the purchase price to the auctioneer, the plaintiff expected the defendant to transfer the properties to his name. However, instead of effecting the transfer to him, the defendant is said to have threatened to re-advertise the properties for sale.
13. It was because of those threats that the plaintiff instituted proceedings seeking;
  - a) A mandatory order of injunction compelling the defendant to discharge the charges held by it in respect of parcels of land Nos: East Gem/gongo/543, North Marama/inaya/30 And Kisa/doho/99 and 151; execute all necessary transfer documents and cause to be transferred in the plaintiff's name, the said parcels.
  - b) In default of (a) above, the deputy registrar of this honourable court do execute the necessary documents."
  - c) Costs of the suit plus interest.
  - d) Any other of further relief the court deems necessary to grant."
14. In answer to the plaint, the defendant filed its defence. Essentially, the defendant denied being a chargee in respect to the 4 properties. It also denied having taken any steps to exercise its statutory powers of sale. The defendant indicated that it would put the plaintiff to strict proof, to demonstrate the averments set out in the plaint.
15. When then case came up for trial, on July 8, 2017, the plaintiff testified. He said that a firm of auctioneers named J S Odambo Auctioneers had given out some "leaflets", in which they indicated



that the parcels of land which are the subject matter of this case, were to be sold by public auction on March 12, 1993.

16. The plaintiff testified that he placed bids in respect of the following parcels of land;
  - a. Kisa/doho/99;
  - b. Kisa/doho/151;
  - c. Gem/gongo/543; and
  - d. Marama/inaya/30.
17. His collective bid for the 4 properties was Kshs 180,000/=. When he was declared the purchaser, the plaintiff paid Kshs 60,000/- as a deposit. The plaintiff exhibited a receipt to prove that he paid the sum of Kshs 60,000/=. The record of proceedings also indicated that the plaintiff exhibited a receipt to prove that he paid the balance of Kshs 120,000/=. Whilst the receipt for Kshs 60,000/= was in the court file, I failed to trace the receipt for Kshs 120,000/=
18. Nonetheless, this court has no reason to doubt that on March 12, 1993 the respondent herein paid Kshs 60,000/= and that on March 29, 1993, he paid Kshs 120,000/=. Meanwhile, the certificate of sale which the plaintiff was given by the auctioneers is dated March 15, 1993. There is no explanation from the plaintiff, to enable the court understand the reason why the certificate of sale was issued about 14 days prior to the payment of the balance of the purchase price. In the absence of an explanation why the certificate of sale was issued well before the plaintiff had paid the balance, I find that the said certificate appears to have been issued prematurely. I further note that, pursuant to the certificate of sale, the plaintiff was required to pay;

... The charges (to) Advocates M/s R K G Onywera Advocates of P O Box 1620, Kisumu within thirty days from the date of sale, to complete the sale.”
19. When he was being cross-examined, the plaintiff said;

I did not pay advocate’s fee. I was not to pay them.”
20. I find that that evidence is inconsistent with the contents of the certificate of sale which the plaintiff sought to rely upon. He was supposed to pay charges to the Law Firm of R K G Onywera Advocates, within 30 days, so as to complete the sale. As the plaintiff did not remit payment, I find that he did not complete the sale. In its defence, the bank had denied having been a chargee in respect to the properties in issue. The defendant could thus not have exercised a statutory power of sale, if their contention was correct.
21. The nexus between the defendant and the properties ought to have been established through evidence. The plaintiff could have done so by providing evidence of searches in respect to each of the properties. The plaintiff should also have provided evidence to show that M/s Odambo G S Auctioneers were agents of the defendant. In the absence of evidence that the said auctioneers were the agents of the defendant, I find that there was no legal basis upon which the defendant could be held accountable or liable for the actions or omissions of the said auctioneer. The learned trial magistrate made a finding that the defendant had failed or refused to discharge the titles in issue, and to transfer the properties to the plaintiff. As far as the trial court is concerned, the submissions made by the defendant had raised various issues which were based on purported facts, which had not been established by way of evidence. For that reason, the trial court rejected the submissions.



22. In principle, legal submissions cannot be a substitute for factual evidence. Therefore, when a party was advancing submissions which had no factual foundation, the court would be entitled to make a finding to that effect. In this case, the plaintiff provided evidence about the date when the auctioneers put up for sale, the properties which are the subject matter of the suit. In my understanding, the defendant based its submissions upon the evidence tendered by the plaintiff. The defendant simply asked the court to draw conclusions based on the evidence actually tendered. As I have already held herein, the evidence did not prove that the auctioneer was an agent of the defendant. Secondly, the evidence showed that the auction was held on March 12, 1993. As the plaintiff paid the balance of the purchase price on March 29, 1993, it follows that he became entitled to demand for the transfer of the suit properties, immediately thereafter.
23. Pursuant to section 4(1) of the *Limitation of Actions Act*, actions founded on contract must be brought within 6 years from the date when the cause of action accrued. As the cause of action herein accrued on March 29, 1993, the plaintiff should have brought the claim by March 28, 1999. The claim was instituted by way of a plaint dated May 2, 2002. As section 4(1) of the *Limitation of Actions Act* stipulates that actions founded on contract may not be brought after the end of 6 years from the date on which the cause of action accrued, I find that the suit was filed out of time. Therefore, I find that the trial court ought not to have granted the remedy sought or any other remedy, because the suit was filed well outside the period within which it could have legally been instituted.
24. In the result, the appeal is merited, and is allowed. I set aside the judgment of the trial court, and I substitute it with an order dismissing the plaintiff's suit.

The costs of this appeal, together with the costs of the suit, are awarded to the appellant.

**DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JANUARY, 2023.**

**FRED A OCHIENG**

**JUDGE**

