



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Commercial Bank Limited v Okiya (Civil Appeal
20 of 2018) [2023] KEHC 89 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 89 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 20 OF 2018
FA OCHIENG, J
JANUARY 17, 2023
(FORMERLY ELC APPEAL NO. 20 OF 2018)**

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPELLANT

AND

SAMSON OKIYA 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. 31 of 2017 (formerly Kisumu Chief Magistrate's Civil Case No. 414 of 2002))

JUDGMENT

1. By a judgment dated 15th May 2018, the learned trial Magistrate ordered the defendant to refund to the plaintiff the sum of Kshs. 476,000/= together with interest thereon at court rates from the date when the said amount was paid. The trial court also awarded costs of the suit, to the plaintiff.
2. The defendant lodged an appeal to challenge the judgment. In its Memorandum of Appeal, the defendant raised 4 grounds of appeal, which can be summarized as follows:
 - i. There was no evidence that the money was paid to the defendant, who had denied being a party to the transaction in which Ms. Odambo Auctioneers allegedly sold land to the plaintiff.
 - ii. There was no evidence that the said auctioneers were acting on behalf of or as an agent of the defendant or on the instructions of the said defendant.
 - iii. There was no evidence that any of the properties which were allegedly purchased by the plaintiff, at an auction, were held by the defendant as securities or at all.
 - iv. The suit was barred by statute pursuant to Section 4(1) of the *Limitation of Actions Act*.



3. By a plaint dated 2nd May 2002, the plaintiff asserted that the auction sale at which he purchased the 4 parcels of land was carried out by M/s Odambo G. S. Auctioneers, in their capacity as agents of the defendant, who was exercising its statutory power of sale.
4. The plaintiff further asserted that the defendant was a chargee with respect to the following parcels of land;
 - a. East/Gem/Nyamninia/927;
 - b. East/Gem/Nyamninia/877;
 - c. East/Gem/Nyamninia/970; and
 - d. East/Gem/Nyamninia/954.
5. According to the plaintiff, the auction was conducted on 13th May 1994, and he purchased the 4 parcels of land, at the price of Kshs. 476,000/=.
6. After paying the full purchase price, the plaintiff expected the defendant to discharge the charges and to cause the properties to be transferred to him. When the defendant declined to discharge the charges and to transfer the properties to him, the plaintiff instituted proceedings to compel the defendant to discharge the charges and to execute all the necessary transfer documents which would enable the properties to be transferred to him.
7. In the alternative, the plaintiff prayed for an order compelling the defendant to refund to him, the purchase price together with interest thereon at court rates, from the date when the said purchase price was paid by the plaintiff.
8. In its defence, the defendant stated that it did not have any charge against the 4 suit properties. It indicated that the plaintiff would be put to strict proof concerning his assertions that the bank had caused charges to be registered against the suit properties as security for some loans which the defendant had advanced.
9. The defendant further denied the contention that it had taken steps to exercise its statutory powers of sale, by getting M/s Odambo G. S. Auctioneers to auction the suit properties.
10. When the case came up for hearing, the only witness who testified is the plaintiff. He said that in early May 1994, some leaflets were being given out in Yala Town. The said leaflets were advertising the intended sale of some plots. As he was interested, the plaintiff went to the Post Office grounds within Yala Town, which was the venue for the sales.
11. The plaintiff put up bids for the 4 parcels of land which are the subject matter of this case. He was the highest bidder for the said parcels of land, which were auctioned as a block. The total purchase price was Kshs. 476,000/= . The plaintiff paid Kshs. 200,000/= and the auctioneers issued him with a receipt. The said receipt was produced as evidence in court.
12. On 18th May 1994, the plaintiff paid a further sum of Kshs. 200,000/= . During the trial, the plaintiff exhibited the said receipt. Finally, on 30th May, 1994 the plaintiff paid the sum of Kshs. 76,000/= . According to the plaintiff, the auctioneers were selling the properties on behalf of their client, KCB.
13. During cross-examination, the plaintiff told the court that he did not have any document which showed that the auctioneers had authority from KCB, to sell the properties in issue. He also did not provide any copy of the advertisements which the auctioneers had carried out in respect to the scheduled auction. After the plaintiff testified, he closed his case.



14. The defendant did not call any witnesses. However, the defendant did make submissions. The learned trial Magistrate made the following observation concerning the defendant's submissions;

“The defence counsel filed written submissions whereby he raised various issues in regard to the law on contract and estoppel.

The same, however, are based on purported facts which the defendant did not establish before the court by way of evidence.

I thus reject the same.”

15. I find that if submissions are not founded upon evidence, they cannot advance the case of the party. Submissions based on law cannot be a substitute for factual evidence, when the law is dependent upon matters of fact.

16. Pursuant to the provisions of Section 107 of the *Evidence Act*, the burden of proof vests upon the party who desires the Court to give judgment as to any legal right or liability which is dependent on the existence of facts which he asserts: therefore, the said party must prove that those facts exist.

17. Therefore, as the plaintiff's case was pegged upon the following assertions, he had the obligation to produce evidence to prove them;

(a) The bank had registered charges in respect to the 4 properties.

(b) The auctioneer who was selling the 4 properties, was the agent of the bank, which was exercising its statutory powers of sale.

18. I so hold because if the bank did not have any charges registered against the titles of the properties in issue, the bank could not have been capable of exercising its statutory powers of sale, in relation to the said properties.

19. Secondly, if the bank had neither instructed nor authorised the auctioneer to sell the suit properties, the auctioneer cannot have been the agent of the bank.

In accordance with the provisions of Section 108 of the *Evidence Act*;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

20. It is my understanding that the bank would only have had an obligation to adduce factual evidence to counter actual evidence which the plaintiff had produced; and which would be sufficient to lead to a finding of liability, unless such evidence was countered adequately.

21. In other words, if the plaintiff produced evidence which was inadequate to prove that the defendant was liable, the court should not hold the defendant liable simply because the defendant had not produced evidence.

22. I find that the evidence adduced by the plaintiff was so inadequate that it could not sustain a finding of liability against the bank.

23. I also note that the certificate of sale was dated 15th March, 1993. By that date, the plaintiff had only paid Kshs. 200,000/= out of the purchase price of Kshs. 476,000/=. Accordingly, the certificate of sale was issued prematurely. This finding is based on evidence provided by the plaintiff. It was not a disputed fact.



24. In the submissions lodged before the trial court, the plaintiff noted that;
- “Rule 18(3) (of the Auctioneers Rules 1997) provides that on receipt of the proceeds of sale, the auctioneer shall issue a receipt for it, and in case of immovable property sign a memorandum of sale.”
25. Although the plaintiff submitted that the auctioneer complied with all rules, including Rule 18(3), there is no memorandum of sale which has been provided to the court, to prove compliance.
26. The plaintiff stated, in his submissions before the trial court that he was issued with the final receipt on 30th May 1994, after he paid the balance of Kshs. 76,000/= . Therefore, in the plaintiff’s understanding, the properties ought to have been transferred to him after he had paid the full purchase price.
27. When the bank failed to effect the transfer of the properties, the plaintiff had a right to institute proceedings against the said bank, with a view to giving effect to the contract for the sale of the suit properties.
28. Pursuant to Section 4(1) of the *Limitation of Actions Act*, no action which is founded on contract may be brought to court after the lapse of 6 years from the date when the cause of action accrued. From the evidence tendered by the plaintiff, the cause of action accrued on 30th May, 1994. Therefore, any action founded on the contract should have been brought by 29th May, 2000. The plaint in this case is dated 2nd May, 2002. In the circumstances, the suit was instituted after the lapse of the period within which the law stipulated.
29. As the suit was time-barred by statute, the learned trial Magistrate had no authority in law, to grant any remedy or relief on it. In the result, the appeal is successful. I set aside the judgment dated 15th May, 2018, and I substitute it with an order dismissing the plaintiff’s suit.
30. The respondent herein will pay to the appellant the costs of the appeal as well as the costs of the suit.

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

FRED A. OCHIENG

JUDGE

