



REPUBLIC OF KENYA



KENYA LAW
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**Suter v Kenya Commercial Bank & 3 others (Civil Suit 21 of 2019)
[2023] KEHC 17509 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 21 OF 2019
RN NYAKUNDI, J
MAY 17, 2023**

BETWEEN

JERINA JEBET SUTER PLAINTIFF

AND

KENYA COMMERCIAL BANK 1ST DEFENDANT

HARON KIPSANAI KIPTOO 2ND DEFENDANT

BRENDA JEPKOSGEI CHESINGEI 3RD DEFENDANT

TANGO AUCTIONEERS AND GENERAL MERCHANTS 4TH DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit vide a Plaint dated May 13, 2019, amended on July 1, 2021 seeking the following orders: -
 - a) Declaration that the Plaintiff parcel of land No Eldoret Municipality Block 14/1015 was illegally and fraudulently.
 - b) An order directing the Land Registrar Uasin Gishu County to cancel the title deed issued in the names of 3rd Defendants and the same be reverted to the plaintiff.
 - c) A permanent Injunction restraining the Defendants their agents and/or servants or any other persons acting for and on behalf of the Defendants from interfering, dealing with, alienating or in any other manner whatsoever dealing with plaintiff's parcel of land no, Eldoret Municipality Block 14/1015.
 - d) Costs of the suit.
 - e) Any other relief that this court deems fit to grant



2. A brief summary of the case is that the plaintiff claims that she was the registered proprietor of EM/Block 14/1015, measuring half an acre and she charged the said property to M/s Kenya Commercial Bank Ltd, the first defendant to secure the payment of a sum of Kshs 2,000,000 advanced to the second defendant. There was a default in repayment by the second defendant which led the first defendant to commence recovery proceedings. These proceedings led to the alleged fraudulent sale of the plaintiff's property to the third defendant and as such the plaintiff instituted the present suit to recover the land.

Plaintiff's Case

3. The plaintiff took issue with the statutory power of sale over the suit property. It is her case that the sale of her property was fraudulently and illegally sold.
4. Learned counsel for the plaintiff submitted that the statutory Notice dated July 18, 2017, quoted the sum owing as Kshs 5,193,673.7 was exaggerated. The initial Statutory Notice of three months dated January 31, 2017 put the figure owing at Kshs 2,276,120.95. She stated that the explanation as to how the figure rose from 2,276,120.95 to Kshs 5,193,673.47 within 6 and 1/2 months given by DW1, Simon Rotich, was that there was a guarantee given by the borrower who happens to be the second defendant in respect of an overdraft/personal loan of Kshs 2,000,000/=. Counsel urged that this claim has never been substantiated to date. The Bank Credit Manager Samwel Kipchirchir who wrote the statement dated 23.5.2019, decided not to testify. The Notice, as drafted, did not accurately specify what the outstanding arrears was. Counsel relied on the case of *Florence Njeri Karanja v. Moly Credit Limited* HCCC No 494 of 2013, (2014) eKLR in support of this submission.
5. It was the plaintiff's case that there was collusion, fraud and legality between the Bank and the Auctioneer. That when the auctioneer was cross examined on why the terms of the payment of 25% at the fall of the hammer and the payment of the balance of the 75% were different from the newspaper advertisement, the alleged date of auction and the Memorandum of Sale he responded that he was acting on the instructions of the Bank. It was the bank that told him to give more time to pay the Kshs 1,500,000/= and not at the fall of the hammer as per the advert. It was also the bank that told him to extend the date for the final payment of the balance in the Memorandum of Sale dated 2.11.2018 by 90 days. Counsel urged that this was fraudulent, criminal and illegal. The law on this matter is clearly spelt out in section 21 of the *Auctioneers Act* No5 of 1996. While this auction was advertised for October 8, 2018, at 11.00am, it is clear that the public auction was never held. Further, that the Notification of sale indicated that the time of sale will be 10.30 am at Iten town. The Certificate of Sale, which ought to be the conclusive proof of the auction, does not mention the date, the place or the time it was held. It is dated November 2, 2018, at Nakuru.
6. The Memorandum of Sale confirms this situation because as per paragraph 3 thereof, the sum of Kshs 1,500,000 was never paid at the auction. It was not paid at the fall of the hammer. It was paid on November 5, 2018. Counsel pointed out that the balance was deferred to be paid 90 days later as per paragraph 4 of the Memorandum of Sale. The claim of the deposit being refunded in paragraph 5 was never followed up even though the delay went beyond January 9, 2019. This also puts to shame; the Auctioneers claim in paragraph 8 of his statement that a deposit of Kshs 1,500,000 was paid at the fall of the hammer, which is a lie. The burden of paying the interest for all these days was pushed to the plaintiff. Further, this contradicts the third defendant's claim in paragraph 5 of her statement that, "I paid the required 25% deposit being Kshs 1,500,000/= to the first defendant"
7. If the auction was ever held on 8.10.2018, then the same was still fraudulent in that section 21 (9) (a) of the *Auctioneers Act* pronounces that any person who knowingly receives or makes any bid contrary to section 21 commits an offence. To the extent that the Auctioneer went ahead to draft a Certificate



of Sale and a Memorandum of Sale, knowing that the monies were never paid, he omitted an offence. The same applies to the third defendant who made bids knowing very well that she had no money to meet the bid. Indeed, section 21 (9) (b) is clear that the third defendant was fraudulent and a felon.

8. Learned counsel Dr. Chebii for the Plaintiff submitted that the third respondent's notice to quit addressed to the Plaintiff dated 1.4.2019, she gave the plaintiff 14 days to quit. This was a clear violation of the plaintiff's rights as the Notice was against rule 65 of the Land Regulations 2017. With all these irregularities on the part of the Bank, the Auctioneer and the purported purchaser, the only remedy available is the cancellation of title No Eldoret Municipality/ Block 14/1015 issued to the third defendant.
9. Learned counsel further submitted that the Plaintiff has established fraud and lack of care on the part of the first defendant. The declaration should issue that the sale of EM/Block 14/1015 was illegal, fraudulent, null and void. The Land Registrar should cancel the title issued and restore the status before the illegal sale and an injunction should issue to restrain any further interference by the defendants. Further, that PW 2, the valuer put the value of the property at Kshs 10,000,000 yet the sale of the property was at Kshs 6,000,000 and this is complete evidence of fraud. It was also learned counsel's contention that the exercise of the statutory power of sale was irregular and unlawful. In buttressing his legal reasoning learned counsel cited and placed reliance on the following cases. "[*Florence Njeri Karanja v. Moly credit Limited*](#), [*Joseph Siro Mosioma v Housing Finance Company of Kenya*](#) (2018) eKLR, [*Muiri Cofffee Estates Limited v. Kenya commercial Bank Ltd*](#) 2009 (2009) eKLR & [*Sbarok Kher Mohamed Ali & 2 others v. Southern Credit Banking Corporation Ltd.*](#) (2018) eKLR."
10. What can be deduced from the submissions learned council for the plaintiff is that the purported sale was not a true sale as provided for in the mortgage deed and applicable provisions of the [*Land Act*](#) 2012 and case law as referred to in this litigation. So strong was his proposition to persuade the court to overturn the selling of the property at an undervalue.

1st & 4th Defendant's Case

11. Learned counsel for the defendant submitted that the suit is *sub judice* as there is a case known as Eldoret CMCC No 18 of 2018 which suit was filed by the firm of Douglas Ombati & Co. Advocates on behalf of the Plaintiff. Similar to the dispute herein, the dispute in the lower court suit revolves around the exercise of the 1st Defendant's statutory power of sale over the same property being Title No Eldoret Municipality Block 14/1015 thus bringing the suit herein within the ambit of Section 6 of the [*Civil Procedure Act*](#). Counsel submitted that although the Plaintiff sought to find refuge from the provisions of Section 6 of the [*Civil Procedure Act*](#) with the addition of the 3rd & 4th Defendants to the suit which parties were not sued in the subordinate Court, the addition of the said Parties did not cure the defect in the suit in terms of Section 6 of the [*Civil Procedure Act*](#) as these parties could have been introduced to the subordinate court suit through Amendment of the Pleadings.
12. When the issue of the similarity of the suits was brought before your sister, the Hon. Lady Justice Olga Sewe during the hearing of the interlocutory Applications, the Honourable Judge made a finding that has never been reviewed, appealed or in any other manner contested to date. Further, that in her recommendations/final findings, the Honourable judge stayed the suit pending confirmation of the withdrawal of the subordinate court's suit. On the part of the 1st & 4th Defendants, no Notice of Withdrawal of the suit was ever served by the Plaintiff and during the hearing of the suit, the Plaintiff did not avail any evidence confirming the suit was withdrawn as recommended by the Judge. Nothing could have been easier than for the Plaintiff to avail evidence of withdrawal of the subordinate court's suit.



13. Learned Counsel submitted that since fraud is a serious allegation, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this Court in *Central Hank of Kenya Limited v Trust Bank Limited & 4 others* [1996] eKLR as being beyond that of a balance of probabilities. Further, that save for a general listing of some particulars of alleged fraud at paragraph of the Plaint, the Plaintiff made no effort to specifically particularize the alleged instances of fraud and illegalities against any specific Defendant and even during the hearing, the Plaintiff did not provide any concrete proof of fraud against the Defendants.
14. It was the 1st and 4th defendants' case that the evidence provided by the 1st & 4th Defendants contradicts that contention as all notices were served. Refer to Defence Exhibit numbers 3-7 where the 1st Defendant's 90-day Statutory Notice and 40-day Redemption Notice were served upon the Plaintiff through registered post while the Auctioneers Redemption Notice and Notification of sale was served personally upon the Plaintiff.
15. Learned counsel Mr. Mburu Maina for the 1st & 4th defendants submitted that the contention that the Plaintiff had been servicing the loan faithfully upon default by the 2nd Defendant until she was served with a notice to vacate by the 3rd Defendant's Advocates. this averment your Lordship lacks any truth in it for the reason that in her subordinate Court suit (see Dexbt 1), the Plaintiff admitted at paragraph 7 of the Plaint that on February 19, 2018, she was utterly shocked when she was served with a notice to settle the outstanding loans failure to which the property would be sold. Both Plaints having been made under oath cannot carry contradicting averments and we urge the court to find that the Plaintiff was not speaking the truth when she purported to deny knowledge of the notices.
16. On the issue of a varied figure in the Notices, DW-1 testified that there was an additional overdraft facility of Kshs 2,000,000/= advanced to the 2nd defendant and which was required to be paid and based on this explanation, we urge the court not to find fault in the Notice. It is proper to note that before the suit property was sold, the Plaintiff went to Court to seek an injunction through an Application that was dismissed and that the Plaintiff never sought to Appeal or review the said Ruling. The Ruling allowing the 1st Defendant to sell the property was made by a court of competent jurisdiction that had the benefit of considering the facts the Plaintiff is relying on when seeking to annul the sale.
17. Further learned Counsel Mr. Mburu Maina submitted that no attempt was made by the Plaintiff to pay the outstanding loan and the same having been left outstanding until the date of the Auction. That the Plaintiff cannot seek the nullification of the sale based on a dispute as to the amounts outstanding then as such orders if granted would go contrary to the Ruling by the Subordinate court that allowed the sale to proceed which Ruling was never appealed. No evidence was brought to court by the Plaintiff to show that the few lapses in the manner in which the notices were issued were calculated and aimed at defrauding the Plaintiff. In totality learned counsel relied on the following authorities to convince the court that rights to realise the security by the 1st defendant through a public auction conducted by the 4th defendant was above board and within the covenants of the law. (" See *Ruhangi Properties Limited & 2 others v others v Standard Chartered Bank of Kenya Ltd & 2 others* (2000) eKLR, *Nancy Kaboya amadiva v Expert Credit Limited & another* (2015) eKLR, *Aiman vs Muchoki* (1984) KLR 353, *Joyce Waririmu Karanja v James Mburu Ngure & 3 others* (2018), *Lawrence Mukiri v Attorney General and 4 others* (2013) as well as *Katende v Haridar and Company Limited*, Mwit J. *David Iseo Ayubu v I & M Bank Limited & another*, *Kipsosion Rerimoi Kipkorir (Interested party)* (2020) eKLR, *David Limo Bundotich v Housing Finance Company of Kenya Limited* (2022) eKLR, *Jacob Ochieng Muganda v Housing Finance Company of Kenya Limited*, *Captain Patrick Kanyagia & Another v Damaris Wangechi & 2 others* (1995) eKLR, *Andrew Muriuki Wanjobi -vs- Equity Building Society Ltd & 2 others* (2006) eKLR & *Mubani & another v National Bank of Kenya Limited* (1990) KLR 73"



18. The Plaintiffs allegations that there was no auction due to the execution of the Memorandum of sale at a different date and venue does not negate the fact that an auction was duly conducted as the reason given by the 3rd Defendant for not making payment on the same day being that after the auction, she became aware that the suit property was the subject of active litigation and she did not want to involve herself in purchasing property whose status she was not sure of was valid as a purchaser of property is expected to exercise due diligence.
19. Further learned counsel Mr. Mburu Maina submitted that after the fall or the hammer, the Plaintiffs equity of redemption became extinguished and how the funds were to be collected from the highest bidder became an issue between the bank and the bidder with the Bank choosing to accommodate the 3rd Defendant. As stated by Mwita J. in *David Isoe Ayubu v I&M Bank Limited & another; Kipsosion Rerimoi Kipkorir (Interested Party)* [2020] eKLR, the failure to pay the bid price as per the terms of the sale could not invalidate a sale or revert the property to the Plaintiff. We urge the court to find the explanation on payment as plausible and to further find that the said delay was not perpetuated by malice, fraud or intent to deprive the Plaintiff of her rights in the property.
20. In a nutshell learned counsel contention was that the plaintiff having failed to prove any fraudulent or illegal conduct on the part of the Defendants, the Plaintiffs suit stands unproven and the honourable Court should therefore decline the invitation to grant the prayers sought in the suit. Further, that in the unlikely event that the Court finds any procedural defect in the sale then the court should consider the remedies under Section 99 of the *Land Act*. Learned counsel urged the court to find guidance from the following cases: (See *Muchange Investments Limited v safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002 (2009) eKLR 229., *Vijav Morjaria v Nasingh Madbusinngh Darbar & another* (2000)eKLR, *Central Bank of Kenya Limited v Trust Bank Limited & 4 others* (1996) eKLR. *Halsbury's Laws of England* Vol. 32(4th edition) paragraph 725, Josephat Mwangi Moracha & another b HFC Limited (2021) eKLR. Mwita J in *David Isae Ayub v I&M Bank Limited & Another, Kipsosion Rerimoi Kipkorir (Interested Party)* (2020) eKLR, *Captain Patrick Kanyagia & Another V Damaris Wangechi & 2 others* (1995) eKLR, *Mbuthia vs Jimba Credit Finance Corporation & another* Civil Appeal No 111 of 1986, *Andrew Muriuki Wanjohi v Equity Building Ltd society Ltd & 2 others* (2006) eKLR , *Ze Yun Yang v Nova Industrial Production Limited* (2003) IEA 362. & *Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd* (2014) eKLR"
21. In answer to the thrust of the plaintiff's claim learned counsel invited this court fortified with above principles to find that there was no conspiracy by the 1st and 4th Defendants to dispose of the property in question in a clandestine manner in order to defeat the rights of the plaintiff to achieve an unlawful purpose of selling it at an undervalue.

3rd Defendants' Case

22. Learned counsel Mr. Kibii for the 3rd defendant invited the Court to have a look at the Ruling by the Hon. Justice Sewe delivered on where the learned judge in a Ruling delivered on December 5, 2019 Having failed to avail evidence during trial or to serve the Respondents with evidence of the withdrawal of the suit, it would not be proper for the Plaintiff to be allowed to pursue this suit while concurrently pursuing the subordinate Court's suit earlier filed and to this end, counsel urged the Court to strike out the suit herein for being an abuse of the Court's process.
23. From the evidence on record, there was no evidence availed to suggest that the 3rd Defendant was part of any scheme to defraud the Plaintiff. The 3rd Defendant's evidence that she came to learn about the intended auction through the newspaper advert was never impeached. It was never shown that the 3rd Defendant had any interaction with the 1st & 4th Defendant beyond the auction, execution of the



- Certificate of Sale and Memorandum of sale and payment of the bid price. Counsel submitted that the allegations that the 3rd Defendant abused the statutory notices together with the 1st & 4th Defendant therefore do not hold sway. In any event your Lordship, the 3rd defendant was not mandatorily required to inquire into the propriety of the 1st Defendant's statutory power of sale and as such was not required to confirm whether proper statutory notices had been issued.
24. Learned Counsel Mr. Kibii submitted that the 3rd Defendant clearly showed that she genuinely intended to acquire the property through the auction hence the reason why though not required to go past the sale advertisement, she undertook due diligence to confirm the status of the suit that had been filed by the Plaintiff at the Subordinate Court before paying the deposit and immediately made payment once she came to know the Plaintiffs' Application for injunction had been dismissed. Consequently, the 3rd Defendant fits the definition of a *bona fide* purchaser as defined in *Lawrence Mukiri v Attorney General and 4 others* (2013) as well as *Katende v Haridar and Company Limited*.
 25. On the notice issued seeking the vacation of the Plaintiff, counsel submitted that having lost the right to redeem the property at the fall of the hammer due to her continued unmitigated default, the Plaintiff could not be heard to claim that the 14 days granted to quit was a violation of her rights as the Plaintiff lost the right to possession of the property immediately after the sale. The payments made to the loan account after the sale as per the receipts produced had no effect on the purchase of the property by the 3rd Defendant. The same was just a notice of the 3rd Defendant's intention to take up possession of the property and no prejudice or eviction was occasioned as a result of the notice. In any event, the Plaintiff by failing to redeem the property lost the right to keep its possession.
 26. Counsel urged that the property was sold at a forced sale value of Kshs 6,000,000/= which was a value in compliance with the provisions of Section 97 of the *Land Act, 2012* being not less than 75% of the market value considering the Valuation prepared by Sedco Valuers (K) Limited which valuation was ratified by the Government valuer during assessment of duty payable on transfer.
 27. The learned counsel for the 3rd defendant urged the court to dismiss the suit In its entirety advertent to the principles in the following cited cases: "See *Ruhangi Properties Limited* (supra), *Nancy Kaboya* (supra) *Nancy Kaboya Amadiva v Expert Credit Limited & another* (2015), *Joyce Wairimu Karanja* (supra), *Lawrence Mukiri v Attorney General* (supra) Mwita J. *David Isoe Ayub* (supra) *David Limo Bundotich* (supra) *Jacob Ochieng Muganda* (supra) *Captain Patrick Kanyagia & another* (supra) *Andrew Muriuki Wanjoh* (supra) *Muhani & another* (supra)"

Analysis & determination

28. It is trite law that parties are bound by their pleadings. The court is not in any position to rewrite pleadings for parties and therefore it can only make orders based on the pleadings as filed. This is on consideration of the first prayer which as per the amended plaint reads as follows;

Declaration that the Plaintiff parcel of land No Eldoret Municipality Block 14/1015 was illegally and fraudulently conveyed to the purchaser at the Public Auction.
29. It follows that the order as prayed cannot be granted and is unenforceable. Whereas the same may be chalked down to a grammatical or typographical error, it speaks to the substance of the claim and therefore cannot be regarded a mere technicality. That notwithstanding, I have considered the claim, the responses filed thereto and the submissions of all the parties and the following issues arise for determination;
 1. Whether the plaintiff has discharged the burden of proof to be granted the remedies against the Respondents.



2. Whether the suit is *sub judice*
3. Whether the plaintiff is entitled to the reliefs sought

i. Whether the Plaintiff has discharged the burden of proof to be granted

30. Just as it would be in all other Civil Cases the burden of proof is vested with the Plaintiff to establish all the elements of the claim on a balance of probabilities. Thus the inspiration of the law is to be found in Section 107, 108, & 109 of the *Evidence Act*. One of the most obvious and common recognised principle is set out in the case of *Karuji & another v. Kabiya & 3 others* (1987) KLR 347 the court of Appeal stated that:

“The burden on a plaintiff to prove his case remain the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof ..The plaintiff must adduce evidence which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim”.

31. The burden of proof here which will be tested throughout the evidence tendered by the plaintiff is in respect of the issues raised against the Defendant to establish existence or non-existence of a fact to enable the plaintiff to secure the judgement of the court based on the pleadings and reliefs prayed for in the plaint. The evidential burden is not a burden of proof as such but rather an obligation by the Plaintiff to demonstrate that sufficient evidence is available and properly adduced would be in support of an assertion of fact to convince the court to generate a favourable decision in her favour. It is only after the Plaintiff successfully discharges the evidential burden that the Defendant can be called upon to lead counter evidence to the issues in contestation. In the strict sense this would be the yardstick upon which the Plaintiff’s case is to be evaluated.

Whether the suit is *sub judice*

32. The defendants raised the issue of *sub judice* with regards to the present suit, on the basis that there was a suit in Eldoret CMCC No18 of 2018 concerning the exercise of statutory power of sale over Eldoret Municipality Block 14/1015.

33. Section 6 of the *Civil Procedure Act* states;

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

34. I have considered the ruling of Hon. Olga Sewe delivered on December 5, 2019 where she declared the present suit *sub judice* pending the withdrawal of Eldoret CMCC E&L Suit No 18 of 2018. I note that the plaintiff’s advocate has not addressed this issue in his submissions. Further, there is no evidence before this court that the matter in the Chief Magistrates’ Court has been withdrawn. Addressing the same issue in the Supreme Court of Kenya stated as follows:

The term ‘*sub judice*’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the *sub judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts,



with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

35. It is my considered view that the case in the chief magistrates' court is on the same subject matter and concerns the same parties. The plaintiff has merely stated that the suit in the chief magistrates' case was withdrawn but has not provided any evidence of the same. In the premises, this suit is *sub judice*.

Whether the plaintiff is entitled to the reliefs sought

36. The plaintiff seeks to have the title deed issued to the 3rd defendants cancelled and a permanent injunction against the defendants to prevent them from interfering with the suit land on the basis that the statutory power of sale was illegal and fraudulent.

Whether there was fraud

37. The allegation of fraud unless proved beyond peradventure it cannot deter the mortgagor from securing the rights protected under the agreement. In the persuasive case in *Samuel Kellier (Holdings) Limited & anor v Martin Bank Limited & another* (1970) 3 ALL E.R. 950 at page 953.

“However speaking for myself it seems clear to me where the parties use a system of payment under a contract which involves in fact notional payment in full and a lending on mortgage of a sum it could lead to abuse if the mortgagor was to be kept out of his undoubted rights, expressly provided for by allegations of some connected cross-claim which might prove without foundation”.

38. An allegation on fraud is an exceptional element which borders culpability in criminal law. Where the issue of the fiduciary relationship between the mortgage and the mortgagee paints some characteristics of a forgery for example one of the parties to the contract claiming either he / she did not sign all give authority for the mortgage deed to be an instrument to secure a loan from a financial institution. It seems to be clear from the evidence on record that the decisive factors in this loan agreement are on the face of it not fraudulent. The consequences of this dispute flow from the provisions of Section 90, 91, 94, 96, 97, & 99 of the *Land Act, 2012* which gives the mortgagee the power of sale besides any other term in the deed.

39. The standard of proof of an allegation of fraud is above balance of probabilities. The onus is also on the party alleging fraud to provide evidence and prove its case to the required standard. In *Central Bank of Kenya Limited v Trust Bank Limited & 4 others* (1996) eKLR) this Court expressed itself as follows:-

The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.

40. In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.”



41. I have considered the pleadings and it is apparent that the plaintiff has not provided any tangible evidence that there was fraud in the sale of the suit land. The plaintiff made generalised allegations on the particulars of fraud but did not tender any evidence that spoke to those allegations and in the premises, failed to prove the same.

Whether the statutory power of sale was exercised according to the law.

42. Essentially, the plaintiff and the 1st defendant created an equitable charge in the land in question which specifically appropriated the rights to land to the 1st defendant in satisfaction of a particular date or other obligation owed by the mortgagor or third party entitling the charge to seek to discharge that liability from that asset. It is a transmissible interest to land held by the mortgagor. This is a typical contract which created an equitable charge over a legal interest which arose between the plaintiff and the 1st defendant upon entering into a written contract to release the property to secure the debt advanced by the 1st defendant. The power of sale donated by the statute to the mortgagee is the one which enables him or it to better realise the debt or loan amount released to the borrower on condition that the same is secured by a legal charge. If the bank or the case may be exercises its *bona fide* power of sale for that purpose of redeeming the loan amount without corruption, fraud, or collusion with the purchaser the court will not interfere with the sale. It matters not whether the property charged is matrimonial home or the price is so low as it in itself one can argue and use it as evidence for fraud. The effect of the sale does indeed destroy the equity of redemption. Learned author Ashburner records in his *Principle of Equity* (1902) 47 as follows at page 259

“What, then, are the inevitable terms of the contract of mortgage? The contract was treated quite differently at law and in equity. To deal first with mortgages of land: At law, the mortgage of land was treated as having a conditional fee in the land, which became absolute on the expiration of the time limited by the contract for redemption. The mortgagee could take possession at any time after the conveyance, and, subject only to the contractual right of the mortgagor to redeem, he could exercise all the powers of an absolute owner. The contractual right of the mortgagor to redeem was right which could only be exercised in strict accordance with the terms of the mortgage contract. At law, the mortgagor who had made default had no longer any right to redeem. The mortgagor who remained in possession after the mortgagee’s estate became absolute at law was sometimes described as ‘tenant at will; or ‘tenant by sufferance; of the mortgagee; but these expressions were merely analogical. ... Courts of equity from an early time looked upon the mortgage from a different point of view. They regarded it as a mere security for the payment of money, and limited the rights of the mortgagee to such as were necessary for the purpose of protecting and enforcing his security. ... In furtherance of this view, courts of equity, from the time of Charles 1, or even earlier, gave the mortgagor a larger right of redemption that was prescribed by his contract. They held that he could redeem, on equitable terms, after the expiration of the time fixed by the contract for redemption. They held further that the equitable right of redemption could only be put an end to in two ways, by the lapse of time or the operation of a Statute of Limitations, or secondly, by the decree of the court. As the courts of equity gave the mortgagee this enlarged right, they also held that the mortgagee might, at any time after the mortgagor’s right had accrued, come into a court of equity and insist that the mortgagor should either exercise his right within a reasonable time to be determined by the court, or be forever precluded from exercising it. This was called the right to foreclose”

43. The defendants provided evidence that the statutory notices were served upon the plaintiff vide Defence Exhibit numbers 3-7. The same reveal that the 1st Defendant’s 90-day Statutory Notice and 40-



day Redemption Notice were served upon the Plaintiff through registered post while the Auctioneers Redemption Notice and Notification of sale were served personally upon the Plaintiff. Further, a perusal of the pleadings in the subordinate court over the same suit land reveal that the Plaintiff admitted at paragraph 7 of the Plaint that on February 19, 2018, she was utterly shocked when she was served with a notice to settle the outstanding loans failure to which the property would be sold. The issue of the varied amounts in the notices was addressed by DW1 who testified that there was an additional overdraft facility of Kshs 2,000,000/= advanced to the 2nd defendant and which was required to be paid.

44. I do take note that there was an error with regard to the venue of the auction as stated in the newspaper advert produced as Defence exhibit 9. I have considered the submissions that the sale was irregular as a result of the payments made outside the timelines in the advertisement and I am in agreement with the defendants that the equity of redemption of the plaintiffs became extinguished at the fall of the hammer. In David Isoe Ayubu v I&M Bank Limited & another; Kipsosion Rerimoi Kipkorir (Interested Party) [2020] eKLR, Hon. Mwita J stated that the failure to pay the bid price as per the terms of the sale could not invalidate a sale or revert the property to the Plaintiff.
45. The legitimate purpose of the public auction conducted by the 4th defendant as an agent of the 1st defendant was to secure repayment of the mortgage money by way of sale. We have not been told by the plaintiff that the power of sale exercised by the 1st defendant on instructions executed by the 4th defendant was meant to literally deprive the plaintiff of the property outside the terms of the mortgage deed. It is very difficult to rule that the power of sale being impeached by the plaintiff is not done in good faith and in absence of evidence to that effect it is not possible to conclude that the sale was reckless or fraudulent. What constitutes a proper price in auction is a moot question. Respectively, that line of argument by the plaintiff fails to carry the day under section 107 (1) of the Evidence Act to secure judgement in our favour. I have taken the liberty to scrutinise the evidence on valuation of the property, I am not convinced that the 1st defendant as a principal to the 4th defendant did not take reasonable steps to obtain the best price at an auction conducted by the 4th defendant. As much as the plaintiff feels it was outrageous but purely not within the ambit of the standard of proof on a balance of probabilities.
46. On the issue of valuation, it is apparent that the valuation report as Plaintiff Exhibit 9 revealed that the property was valued at Kshs 10,000,000/- with a forced value sale of Kshs 7,500,000/- thus the allegation that the property was Kshs 30,000,00/- is unfounded. Then the dominant element for consideration in this case has always been the nature of the property as regards value obtainable on the day of the Public Auction. The plaintiff is far asking the court that we must interfere with the purchaser's interest or at most order for damages as a compensatory limb for the breach by the 1st and 4th Defendant. It may be however questioned whether at the time of sale in a public auction the 4th defendant acted carelessly, recklessly, negligently, or again in conspiracy with the 1st defendant to acknowledge and admit and undervalued bead.
47. In determining what is the reasonable value the public auction could have fetched in determining for the purposes of the exercise of the power of sale? Certain questions are relevant. What are the relevant contractual terms? And what type of mortgage was in place between the plaintiff and the 1st defendant? What was the reasons for the arrears which had accumulated in necessitating the rights of the legal mortgagee for enforcing the security? How much had the plaintiff reasonably afforded to pay at the time of receipt of the demand notice and thereafter the notification of sale? Moreover, what are the ley factors to fault the valuation by the 1st defendant? Was the valuation of 6000,000 oppressive or an unconscionable? It is not clear from the evidence but the requisite degree to impeach a valuation by the mortgagee must be of so aggravated nature to amount to a breach a fiduciary duty by the 1st



defendant to the plaintiff. That criteria set out in Section 97(2) of the Land Act has not been proven by the plaintiff in case at bar. In Zumzum Investment Ltd v Habib Bank Limited (2014) eKLR Kasanog J where the Applicant had proffered a counter valuation report against the lender’s report Kasango J observed that:

“It is not sufficient for the plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter – valuation report. The plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on (in auctioning the charged property) does not give the best price obtainable at the material time.. The plaintiff needs to show, for instance, that the Defendant’s valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration for irrelevant factors or that the valuation was done before the time of the intended sale”.

48. The remedy sought by the plaintiff against the 1st, 2nd 3rd & 4th Defendants for as the mortgage deed in question was dully registered and therefore liable to the 1st defendant to exercise its power of sale under Section 96(1), 97(1) 98(1), & 99(1) of the Land Act, 2012, as it is clear there was an outstanding loan amount yet to be settled. The remedy which could have been available for the plaintiff was when she could have established the loss or injury suffered on grounds of an improper exercise of the power of sale to warrant an assessment in damages against the 1st & 4th defendants. In my considered view of the facts and the law applicable to these facts, the plaintiff failed to establish any of those features for this court to make a positive finding in damages. Having concluded so, the suit be and is hereby dismissed with costs to the defendants.

DELIVERED VIA E-MAIL DATED AND SIGNED AT ELDORET ON THIS 17TH DAY OF MAY 2023

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R. NYAKUNDI
JUDGE

