REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 1552 OF 2001

MARY WAMBUI NJURI .....PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF

KENYA LIMITED.....1st DEFENDANT

JOSEPH MUNGAI GIKONYO

t/a GARAM INVESTMENTS AUCTIONEERS .....2ND DEFENDANT

JANE NYAWIRA KINYUA.....3RD DEFENDANT

JUDGMENT

1. The events leading to this old litigation has its genesis in the terror attack of 7th August 1998 on the American embassy along Haile Selassie Avenue, Nairobi.

2. Not too far from that embassy is a building then known as Co-operative House which housed offices of Co-operative Bank of Kenya (the 1st Defendant or Bank). In that building, and at work, was Mary Wambui Njuri (the Plaintiff or Mary), then an employee of the Bank. Like several other employees, she sustained injuries as a result of the blast at the Embassy.

3. The injured employees, including Mary, would require treatment for the injuries sustained. The Bank arranged a medical scheme in which the injured employees would be treated and reimbursed for the medical expenses incurred. The Bank explained that the objective of the scheme was for employees to access the best medical care. Mary was a beneficiary of that scheme.

4. The woes of Mary were compounded when it was alleged by the Bank that medical claims submitted by her were fictitious and fraudulent. Mary's case, presented through a second Further Amended Plaint dated 12th January 2003, was that not only were the allegations false but that she was not given reasonable opportunity to respond to the allegations of fraud. She was dismissed from employment by the Bank on 13th May 1999.

5. In the letter of dismissal (Exhibit Page 78), the Bank cites the false medical claims as the reason for dismissal. The letter, in addition to extinguishing Mary's employment, required her to immediately repay the sum said to have been misappropriated. Crucial, and at the heart of the controversy between the Bank and Mary, was the following demand by the Bank:-

> "In accordance with the special conditions in the letters of offer for your outstanding loans, we hereby demand full payment of the amounts outstanding together with all accrued interest as determined by the Bank from time to time, note that the loans will attract commercial rates of interest with effect from the date of this letter."

6. Mary alleges that the change of the rate of interest to commercial rate "disorganized" her and she was unable to service the loan. Mary contends the change to be unreasonable and inequitable. Alleging default, the Bank advertised the sale of property known as Muguga/Muguga/T.440 which Mary had charged to the Bank to secure the advances granted to her by the Bank from time to time.

7. Mary complains about the Bank's action and asserts that the Bank exercised its statutory power of sale notwithstanding that it had withheld her terminal dues and benefits. It is also her case that she was not served with the 45 days' notification of sale and no statements of account were furnished or sent to her since the date of her termination.

8. Enter Joseph Mwangi Gikonyo t/a Garam Investments Auctioneers (the 2nd defendant or Garam) and Jane Nyawira Kinyua (the 3rd Defendant or Jane). Garam was instructed by the Bank to sell the charged property. Garam contends that it served the mandatory 45 days' notice and subsequently sold the property by public auction to Jane.

9. In respect to that sale, Mary, in paragraph 22 of her pleadings, alleges the following illegalities:

> "[22] The second Defendant pursuant to the said instructions did advertise the suit premises for sale and thereafter by its servants and/or agents purported to sell the same to the third Defendant which sale was illegal and/or unprocedural.
>
> PARTICULARS OF ILLEGALITY OF THE SECOND DEFENDANT
>
> a) Failing to revalue the suit property prior to the purported auction.
>
> b) Using an unqualified persons to conduct the purported auction contrary to the Auctioneers Act.
>
> c) Disposing and/or selling the suit premises at a gross under value as if the same is not developed whereas the sane (*sic*) is extensively developed.
>
> d) Fraudulently colluding with the third Defendant in the sale.
>
> e) Unlawfully barring other bidders after the third defendant bid of Kshs.703,000/=".

10. Both Jane and Garam deny the assertions. Jane states that she was the highest bidder at the auction and is and was at all material times the proprietor and entitled to possession of the suit property.

11. On another front, Mary states that the contents of the Bank's letters of 10th May 1999 and 13th May 1999 were defamatory of her and contained injurious falsehoods. This complaint was a basis for an action for defamation which however met a premature end when it was dismissed in a ruling of this court dated 20th January 2005. The reason for dismissal was that the action was time barred under Section 4 (2) (a) of the Limitations of Actions Act, Cap 22 Laws of Kenya.

12. Ultimately Mary seeks the following prayers:-

> *a) An order of account and payment of account and of such amount of money as may be found to be due to the Plaintiff by the 1st Defendant being terminal benefits and other dues including pension, provident funds and workman's compensation as prayed in paragraph 10 and 11 of the Plaint.*
>
> *b) A permanent order of injunction to restrain the Defendant, its servants and/or agents from advertising for sale or disposing LR NO. MUGUGA/MUGUGA/T.440 until this suit is heard and determined.*
>
> *b (i) A mandatory injunction to the Defendants, their servants and/or agents from evicting the Plaintiff from the suit premises pending the hearing and determination of this suit.*
>
> *c) An order for the first Defendant to re-adjust the rate of interest from commercial rate to 2.5% and the said rate applied throughout from the date of the loan account.*
>
> *d) General damages for unlawful termination and consequential loss of employment as prayed in paragraph 11 of the Plaint.*
>
> *e) General damages for defamation and injurious falsehood as prayed for in paragraph 14 of the plaint.*
>
> *f) A permanent injunction do issue against the Defendants, their agents and/or servants from evicting the Plaintiff herein.*
>
> *g) A declaration by this Honourable Court that the acts of both the 2nd and 3rd Defendants as alleged in the Plaint were illegal and fraudulent.*
>
> *h) That the purported auction, sale and subsequent transfer of LR NO. MUGUGA/MUGUGA/T.440 by the Defendants be declared by this Honourable Court as illegal, fraudulent and therefore null and void ab initio.*
>
> *i) Interest on (a) (d) and (e) above court rates from 13th May 1999 till payment in full.*
>
> *j) Costs of the suit.*

k) Any other or such other better relief as this Honourable Court may deem fit to grant in the circumstance of this case.

13. The Bank insists that Mary's conduct in regard to the medical claims was fraudulent and in breach of the terms and conditions of her employment with it. The Bank defends its decision to terminate her services under clause A5 of the Collective Agreement between Kenya Bankers (Employees) Association and the Kenya Union of Commercial Food and Allied Workers. The Bank further states that, upon the dismissal, it paid Mary her terminal benefits amounting to Kshs.49,448/45 and a sum of Kshs.232,274/35 being refund of her pension contribution and which payment was effected by credit into her account with the Bank.

14. Answering to matters raised around the sale of the charged property, the Bank states that the adjustment of the rate of interest was in accordance with the terms and conditions of its letters of offer with the Plaintiff. The Bank asserts default by Mary.

15. On her part, Jane seeks the following orders as against Mary:-

i An injunction to restrain the Plaintiff (by herself, her servants or agents or otherwise howsoever) from remaining on or continuing in occupation of the suit premises.

ii General damages for the trespass.

iii Costs of the Third Defendant's Counter Claim.

iv Interest on (ii) and (iii) above at Court rates.

16. The hearing of this matter began on 22nd March 2010 before Hon. Njagi J who took the evidence of three witnesses for the Plaintiff, Mary (PW 1), Geoffrey Gathu Kagia (PW 2), Dr. Tanga Audi (PW 3). Following the death of PW3, Dr. George Kungu Mwaura (PW 4) testified before me and it fell upon me to also hear five Defence witnesses; Joseph Mungai Gikonyo (DW 1), Jane (DW 2), Vera Nyangada (DW 3), Dr. Morris Wabani (DW 4) and Paul Ngugi Njathi (DW 5).

17. The Court will discuss the various aspects of the evidence by the witnesses so far as they assist in resolving the issues for determination. Although the parties did not file a joint set of agreed issues, they relied on those identified individually by them. The issues are generally similar but I choose to adopt those proposed by counsel for the 1st and 2nd Defendants only because they appear comprehensive :-

i Whether or not the medical claims amounting to Kshs.197,000/= submitted by the Plaintiff to the 1st Defendant for reimbursement were fake, exaggerated and/or false intended to defraud the Bank.

ii Whether or not the termination of the Plaintiff's employment by the 1st Defendant was illegal and unlawful.

iii Whether or not the Plaintiff was paid her terminal dues and/or benefits.

iv Whether or not the Plaintiff is entitled to damages and consequential loss of alleged summary dismissal.

v Whether the 1st Defendant was entitled and/or justified in adjusting the rate of interest chargeable on the loan from staff rate to commercial rates upon termination of the Plaintiff's employment.

vi Whether or not the 1st Defendant was entitled to exercise its statutory power of sale.

vii Whether or not the 2nd Defendant served the mandatory 45 days notification of sale to the Plaintiff prior to the auction sale being impugned.

viii Whether there was any collusion between the 1st, 2nd and 3rd Defendants to defraud the Plaintiff of the suit property.

ix Whether the sale of the suit property was illegal, fraudulent and unprocedural.

x Whether the Plaintiff is entitled to the reliefs sought in respect to the auction sale of the suit property.

xi Whether or not the 3rd Defendant is entitled to the counterclaim, and

xii *Who bears the costs of the suit?*

18. The Bank terminated the services of Mary on allegation that she uttered false medical claims and through them defrauded the Bank of a total of Kshs.197,000/=. In these proceedings Mary denies the allegations while the Bank stood its ground.

19. For purposes of processing the medical claims of its injured staff, the Bank developed a Form 13(a) intituled "Medical Aid Scheme Consultation Form" which was to be completed in duplicate. The form was in seven parts; "A" to "F" and a last part "for official use only."

20. Part A provided for details of the employee and was to be completed by the employee. Part B was to be completed by the medical

attendant and was in respect to details of the medical expenses. For instance, the number of consultations and dates of consultations. Part C was for the medical certificate in which the attending doctor was expected to certify that he had seen the employee and the doctor would then list down the drugs/dressing/injections prescribed by him/her. Part D was on the out-patient reimbursement and its details. The part headed "B" but which should perhaps have been "E" was for inpatient details. Part "F" was a declaration by the employee as to the truthfulness and completeness of the information contained in Parts A – E of the form. The last Part was for use by the Bank in which the Chief Manager H.R.D would, inter alia, indicate whether or not the claim was approved.

21. In her testimony to Court, DW 3, the Employee Relations Manager of the Bank, stated that investigations into Mary's claims were triggered by inconsistency between the injury she sustained and the medical claims she made. The alleged claims were from Dr. Audi Tanga and Dr. David Ndirangu (P. Exhibit 1 Pages 47 to 74.)

22. Mary's testimony was that she sustained serious cut injuries on her face, head, left breast and she defended all the claim forms as genuine. In cross-examination, counsel Kimondo for the Bank asked her questions at length in respect to the treatment she allegedly received and the claims made. Part of her testimony was that Dr. Tanga admitted her to City Nursing Home for 3 days. There she was operated on her face and bandages were put on the upper part of the face. Upon being discharged from the hospital she bought some medicine from a chemist at Maendeleo House.

23. In 1998, Dr. Tanga Audi (PW 3) had a private practice clinic at Afya Centre, Tom Mboya Street. His testimony was that he attended to Mary on 27th November 1998 and thereafter continued caring for her during the year. He saw her on several dates in December 1998. As she had multiple foreign particles embedded on her face, he offered surgical exploration and removal of the foreign particles. He says that he operated on Mary at City Nursing Home and that it was a long, albeit, minor operation.

24. On the length of admission at City Nursing Home, the Doctor said:-

> "Patient was taken for surgery on 27/11/98. I can't recall when she was admitted for surgery. I can't remember how long she was admitted there. I can't remember whether she spent a night there."

25. The Bank makes heavy weather regarding the alleged surgery and highlights aspects of the evidence which it submits point to the falsity of the claim. The Court examines them.

26. The first is the date and length of admission juxtaposed with when the surgery happened. Mary's evidence was that she was admitted for 3 days, starting from 24th November 1998. In the claim form, on the part filled by Dr. Tanga, he indicates medical confinement from 24/11/98 to 25/11/98. In emphasis, he indicates that the confinement was one (1) day (See P. Exhibit Page 56).

27. Regarding when the Doctor carried out the operation, Dr. Tanga said it was on 27th November 1998. If that was so, could it be the case that the patient was operated on the very day she was discharged? What would be the purpose of admitting the patient two days prior to the surgery? That is on 24th November 1998.This was not explained by the Plaintiff.

28. That may seem to be a minor issue but something else is disturbing. On the number of consultations, the doctor indicates four (4). This is on a claim form signed by the doctor on 27th November 1998. At the hearing, the doctor's testimony was:-

> "I rendered services to her from 27/11/98 and continued taking care of her during that year."

From this testimony, the 27th November 1998 was the first day he saw the patient. Did the patient seek consultation four (4) times on this one day? It seems improbable and it was little wonder that pressed in cross-examination, the doctor answered:-

> "Number of consultations – four consultations. I signed document on 27/11/98. It speaks of four consultations. I agree it does not reflect the correct position."

The doctor was conceding to an untruth in the claim form.

29. Also troubling is that the claim includes a request for reimbursement of Kshs.500/= for medicine bought on 25th November 1998. The doctor says of this:-

> "Document at top right hand cover at Page 58, it shows that I prescribed medicine for Mary Njeri on 25/11/98. That was not necessarily in connection with the bomb blast."

30. It is common ground that the reimbursement scheme was set up in connection with medical expenses connected with the bomb blast. Indeed, Mary pleads as follows:-

> "The Plaintiff further avers that as a result of the said bomb blast, the first Defendant introduced a medical scheme to assist the staff members who has (sic) suffered injuries whereof staff members who had suffered injuries would lodge claims with the said Defendant for medical expenses and/or reimbursement and these were processed and approved by the said Defendant."

As I understand it, the reimbursement scheme was a special arrangement to assist those who had sustained injuries as a result of the bomb blast to access medical care. It was not in respect to reimbursement of medical expenses generally. For that reason, and in the context of the

scheme, a claim for reimbursement of medical expenses not necessarily in connection with the bomb blast (doctor's words) would be a false claim. Never mind that it was for a small sum of Kshs.500/=. It was a false claim.

31. There is overwhelming evidence that the claim form of 1/12/98 contained untruths. I cannot agree with the Plaintiff's counsel submissions that no proof was tendered to prove that the claims made by Mary were falsified. In respect to that claim, the evidence was stronger than that required to establish fraud, that is, proof that is more than mere balance of probabilities but not beyond reasonable doubt (See for example R. G. Patel V. Lalji Makanji (1957) EA 314).

32. For reasons that will be apparent shortly, having found falsity in a single claim form, the Court need not interrogate the authenticity or otherwise of the other claims.

33. There was an argument by counsel for the Plaintiff that the documents and receipts were owned by their authors (i.e the doctor) and the Plaintiff is therefore blameless. The Court does not agree. Once the forms were completed (many parts admittedly by the doctor), there is an important declaration to be made by the employee and this reads:-

> "I hereby warrant that the above are true and complete. I consent the Bank seeking information from any doctor whom I/ and/ or any Defendants have consulted."

34. Upon the employee making the declaration, then he/she owned the contents of the form. While an employee may not be able to vouch to the accuracy of the medical certificate made by the doctor which may contain technical terms, surely an employee would know the number of times he/she consulted a doctor and the number of days he/she was admitted in hospital. Mary signed the declaration and gave a warranty as to the truthfulness and completeness of the information filed by the doctor on 27/11/98. She does not suggest that she was so disoriented or suffered any incapacity so as to be unable to know the number of consultations and days of admission. The Court holds that the Bank was entitled to take the view, as it did in the letter of dismissal of 13th May 1999, that Mary uttered false medical claims.

35. The dismissal of the Plaintiff was under the terms of clause A5 of the Collective Agreement between Kenya Bankers (Employees) Association and the Kenya Union of Commercial Food and Allied Workers. That clause in part reads:-

> (a) Dismissal
>
> Any of the following acts on the part of an employee shall constitute gross misconduct and/or serious neglect and shall justify instant dismissal.
>
> "(a) If he/she is guilty of misappropriating any funds or property belonging to the employer or belonging to any person having business dealing with the employer".

36. Given this Courts finding in respect to the claim form, the Bank was entitled to summarily dismiss Mary. Even if the Bank was unable to prove fraud in respect to the entire sum of Kshs.197,000/=, fraud of even one shilling would be sufficient for the Bank to invoke the provisions of summary dismissal as it would all amount to dishonest conduct on the part of the employee.

37. In paragraph 8, Mary pleads:-

> "The Plaintiff avers that the Defendant failed to give the Plaintiff a reasonable opportunity to respond to the allegation of fraud and the first Defendant proceeded to dismiss the Plaintiff on 13th May 1999 citing the grounds of fraud in the nature of false medical claims."

38. Let me examine the events leading to the letter of 13th May 1999.

39. On 10th May 1999, the Bank writes to Mary requiring her to show cause why disciplinary action should not be taken against her for allegedly uttering false medical claims and defrauding the Bank of Kshs.197,000/=. The author of the letter Mrs W. Welkon (Chief Manager – Human Resource Development) pens off:-

> "Your response should reach the undersigned not later than 4.30 p.m today, 10th May 1999."

40. In her testimony, Mary stated:-

> "I was required to respond by 4.30 p.m of the same date, and I responded."
>
> She further states that her response was that contained in the letter of 14th May 1999.

41. In this letter of 14th May 1999, she makes reference to the Bank's letter of 11th May 1999. She denied the allegations and says ,partly:-

> "I have never nor intended to defraud the bank as per your letter dated 11th May 1999 and therefore humbly appeal against this suspension."

42. To be noted is that her response is dated 14th May 1999 yet the dismissal letter is of 13th May 1999 but as she make no reference to the letter of 13th May 1999 then the Court assumes that she had not received the dismissal letter by then.

43. But before considering whether this amounted to reasonable opportunity to respond to the allegations, the Court must make one observation. In submissions made on her behalf, counsel also alleges illegality in the process for non-adherence to the staff-manual.

44. This staff manual was not produced in evidence and this Court has not had the advantage of seeing its contents. Again, at hearing, the Plaintiff does not make reference to the manual.

45. On the part of the Defence, DW 3 makes this short reference to the manual in her written testimony:-

> "The Bank in making decision to dismiss the Plaintiff took the following issues into consideration:-
>
> (a) The provisions of the Bank's staff manual as well as the collective Bargaining Agreement."

No further reference was made to this manual at the hearing.

46. Counsel for the Plaintiff asked this Court to be persuaded by the decision of Beatrice N. Kyalo & 29 Others vs Co-operative Bank of Kenya Ltd [2020] eKLR where Hon. Ougo J when considering dismissal of the co-employees of the Plaintiff in circumstances similar to this found the dismissal to be unlawful. I have read that decision and note what the Judge states:-

> "**74. As** stated in the foregoing authorities, the legal position prior to the enactment of the Employment Act, 2007 was that unless specifically stipulated in the contract of employment, an employer was not obliged to give any reason for dismissing an employee from service. In the current case, the application of the rules of natural justice was expressly incorporated into the Staff Manual whose disciplinary procedures also applied to unionisable staff. In the extracts of the Staff Manual which I have reproduced above, it is clear that thorough investigations should have been made into each alleged offence, all circumstances of the case carefully evaluated and the employee interviewed on the matter. The ordinary meaning of the word "interview," is a face to face meeting where one party asks questions and the other party answers."

47. Unlike the case of Beatrice N. Kyalo (*Supra*), the Plaintiff here failed to produce or make reference to the staff manual. Mary alleged lack of sufficient opportunity to respond and it was incumbent on her to prove that allegation. The decision in Beatrice N. Kyalo (*Supra*) is not a Judgment *in rem*. It is a Judgment *in personam* and the decision does not give any traction to the Mary's case. Mary needed to prove her case in the same way the plaintiffs in Beatrice N. Kyalo (*Supra*) had to bear the burden of proving their actions.

48. On the evidence before this Court, the document that formed the contract as regards termination of the employee would be the Collective Bargain Agreement. And I have to agree with DW 3 that there was no provision for a hearing in that agreement.

49. The setting of this matter was in 1998 and the statute then in operation is the applicable law. The statute in regard to employment matters was the repealed Employment Act Cap. 226. As the Court of Appeal observed in Rift Valley Textiles Limited vs Edward Onyango Oganda Civil Appeal No. 1992 [1994] eKLR:-

> **"With respect to the learned judge, the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Again if the employee were to be minded to leave his employment, say for a better paid job and he gives notice of his intention to leave, the employee is not obliged to assign any reason for his intention to terminate the contract and it would be ridiculous for the employer to insist that he be given a hearing before the employee leaves. As we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot find a cause of action."**

50. Also quoted in Beatrice N. Kyalo (*Supra*) is the decision of the Court of Appeal in **Kenya Revenue Authority vs Menginya Salim Murgani Civil Appeal No. 108 of 2010 [2010] eKLR**:-

> "**Firstly, as regards the terms of a contract of service or any other contract it is not the business or function of a court of law to rewrite a contract for the parties by prescribing how the organs entrusted with disciplinary matters in a contract must operate or to introduce terms and conditions extraneous to the contract. Secondly, it is for the parties to provide in the contract how such organs should operate and how the hearings, if any, are to be conducted. A court of law cannot in our view, import into a written contract of service rules of natural justice and the Constitutional provisions relating to the right of hearing.**
>
> **…**
>
> **With respect, the superior court's importation and application of the concept of fair hearing as defined in the context of the Constitution was a clear misapprehension of the law. The section does not and was not intended to apply to contracting parties at all or for that matter to a contract of service unless the parties themselves have specifically stated so in their contract."**

51. Adding a clear voice as to whether or not the right to a hearing was implied in an employment contract prior to the enactment of the Employment Act, 2007, Radido J, in Anthony Mkala Chitavi vs Malindi Water & Sewerage Company Limited [2013] eKLR stated:-

> **"Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities."**

52. The employment contract did not obligate the Bank to give a hearing to Mary and so the Bank neither breached the contract nor the law as was then existing. In the same vein, Mary does not state that her response of 14th May 1998 was inadequate because of the constrained timelines she was given to show cause.

53. In the submissions, there is an attempt by the Plaintiff to introduce a complaint which was not taken up in pleadings. Counsel submits:-

> **"Non consideration of Appeal**
>
> **It is our submissions that the Plaintiff's fate was predetermined and a call for appeal fell on deaf ears. The Appeal was required to be heard by a constituted committee appointed by the Managing Director to deliberate on all cases on termination/dismissal or any appeal against any disciplinary action instituted against an employee. The Appeal was lodged within the required 14 days from the date of dismissal and the Plaintiff has never heard from the Defendant on the issue.**
>
> **It is clear that her appeal was never considered in breach of the 1st Defendant's policy documents. The accusation and dismissal was fraudulent since the 1st Defendant failed to carry out investigation on the allegations determine propriety. It neither constituted the Central Staff Committee/Disciplinary Committee not according the Plaintiff sufficient notice to defend herself as stipulated in the CBA, Staff Manual and/or Employment Contract."**

54. Parties are bound by pleadings. They cannot travel beyond the case they have cast for themselves in their own pleadings.

55. The conclusion I reach is that the termination of Mary by the Bank was lawful and cannot be faulted and now turn to matters surrounding the loan and the sale of the charged property.

56. Having determined that the Plaintiff's termination was lawful, then the Bank could lawfully invoke its right to convert the interest of the facilities enjoyed by Mary to commercial rates. The letters of offer which Mary executed and formed part of the contract had the following clause:-

> "That upon leaving the Bank's service for any reason other than retirement, a commercial rate of interest will be charged."

57. It is conceded by Mary that once the rates were changed then she fell into default. Upon default the Bank was entitled to exercise any of its powers under the law or contract. One such uncontested power was the power to sell the property. This power was reserved in the charge documents entered by the parties. See for example, clause 4 of the 6th further charge (Page 43 of P. Exhibit 1.)

58. The charge and contract was governed by the repealed Registered Land Act. Section 74 of that Act provides:-

> "Chargee's remedies
>
> 74. (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 subsection.
>
> (3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only –
>
> (a) where the chargor is bound to repay the same;
>
> (b) where, by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to

provide such security;

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor;

Provided that –

(i) in the case specified in paragraph (a) –

(a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and

(b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;

ii) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge."

59. The Plaintiff takes up specific complaints regarding the sale.

60. First, that the Defendant did not serve the mandatory 45 days' notification of sale. The requirement of that notice was by the provisions of section 15(d) of the Auctioneers Act which reads:-

"15. Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(a) ……

(b) …..

(c) …..

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction."

61. The Bank relies on the Notice of 7th August 2001 (P. Exhibit 1 Pages 93, 94 and 95) allegedly served upon Mary. In her evidence, Mary denies receiving this letter. She testified:-

"At Page 93 – a letter addressed to me dated August 7, 2001.

Page 95 – Notification of sale but I did not sign the notification of sale. After that I went to Court. I was told by Mr. Nyaga, my neighbour, who had an interest in the plot and was collaborating with the Bank. He also used to come and advise me on how to go about the matter."

62. On the part of the Bank, Mr. Gikonyo who trades as Garam Investments testified:-

"On 7th August 2001, I served the notice upon the registered owner and she duly acknowledged receipt. Agreed list page 95 – This is my notification of sale duly acknowledged by Mary Njuri. Page 93 - This is the second page of my notice. It is a 45 days' notice. It was received and signed by Mary Njuri."

63. At the hearing, Mary was shown the notification and her reaction was:-

"At page 93 – a letter addressed to me dated August 7, 2001.

Page 95 – Notification of sale, but I did not sign the notification of sale. After that I went to Court. I was told by Mr. Nyaga, my neighbour, who had an interest in the plot and was collaborating with the Bank."

64. Counsel for Mary submits that the notices were sent to an address not provided in the facility documents and which was also not her last known address. But what this Court understands to be the Bank's position is that not only was the notification served by way of registered post but also through personal service duly acknowledged by Mary.

65. How are these two rival positions to be resolved? The Plaintiff filed this suit on 11th October 2001. Simultaneously with doing so, she filed an application for injunction, in support of which she swore an affidavit on 11th October 2001. Regarding what prompted her to come to

Court, she says:-

> "[11] THAT on the 9th October 2001 while I was at my said Residential Property, I was very surpassed (*sic*) to see a gentleman who was a stranger to me who came to my said property and informed me that he had been directed to come by Garam Investments to view the property for it was being auctioned on 12th October 2001 and that he was interested in the said property.
>
> [12] THAT said gentleman refused to identify himself but he left me with a copy of Notification of Sale which he informed me had been given by Garam Investments which showed that my said property would be auctioned on 12th October 2001 at 12.00 noon and the auction would be conducted near Kikuyu Law Courts. The said gentleman also informed me that the property had already been advertised in the Monday 8th Nation Newspaper which I confirmed. Annexed hereto and marked "MWN5" and "MWN6" are true copies of the Notification of sale left behind by the said gentleman and a copy of the advertisement in the Nation Newspaper for 8 th October 2001."

66. What she stated under oath on 11th October 2001 does not correspond with her oral testimony at the hearing. Not once in her oral testimony does she make reference to the visit of 9th October 2001 when the notification was allegedly served. Indeed, she gives the impression that she learnt of the intended auction through a neighbour which is a contrast with what she states in her affidavit that she learnt of it after a visit on her land on 9th October 2001 by a gentleman from Garam Investments.

67. Given the inconsistency in her evidence on this aspect, I choose to believe the account of the auctioneer. The evidence is that she was served with a 45 days' notification of sale in person on 7th August 2001 and she acknowledged receipt of service by signing a copy of the notice. This notice was for an auction intended for 12th October 2001. As is common ground between the parties, the auction did not proceed as planned because of an injunction order issued by this Court by consent of the parties on 12th October 2001. However those temporary orders we lifted and an auction then proceeded on 27th March 2002.

68. Although no further 45 days' notification was issued, nothing can turn on this as the law does not require the giving of a second notice in these circumstances. The Court in **Joseph Kiarie Mbugua & Another v Garam Investment Limited & another [2006] eKLR** where Hon. Ochieng J. in dealing with a similar situation where the Plaintiffs had not been served with a second Notification of Sale relied on the case of **Nathaka Monji Rai –vs- Standard Chartered Bank (K) Limited & Another, HCCC NO. 830 of 1999** in which Hon. Onyango Otieno J. (as he then was) held:-

> **"The Auctioneers Act seems to me to be silent as to whether once an auction scheduled for a particular day is suspended or stopped temporarily, the Auctioneer should, on the next scheduled sale, go through all the rules all over again. One may ask, once an auctioneer has got the instructions letter in respect of the sale of a particular property, and he had complied with all the rules, and then the sale is suspended or temporarily stopped at the eleventh hour, should the auctioneer go through all the rules again when he is again instructed to go ahead with the sale on another day? In case of notification of sale, should he issue a fresh one?**
>
> **In my opinion, there are some rules that he needs to go through once again, but I respectfully think that there are some rules which to repeat, would make a mockery of the rules and may make it difficult if not impossible for the judgement creditors or mortgagees to realise their power of sale, and thus may make it impossible for the judgement creditor to enjoy the fruits of judgement given in his favour or the mortgagee, to realise the recovery of the money loaned.**
>
> **…..**
>
> **However, in my humble opinion, once he (the auctioneer) has received such letter of instructions, and has given the debtor 45 days' notice, it would be unfair to insist that if that sale is suspended, and he gets another letter instructing him to proceed with the sale of the same property, in respect of the same loan and from the same mortgagee, he should give the same 45 days' notice afresh. I think one has to look at the purpose for such a notice. In my opinion, such a notice is as clearly stated in the rules, to give the debtor opportunity to redeem the property. I cannot see any good reason for giving the same opportunity every time the sale does not go through."**

69. The learned Judge in **Nathaka Monji Rai** (*Supra*) in arriving at his decision, relied on the sentiments of Hon. Apaloo J.A (as he then was) in the case of **George Gikubu Mbuthia –vs- Jimba Credit & Another, Civil Appeal No. 111 of 1986** where the honourable Judge of Appeal held as follows:-

> **"It is plain that section 74 did not impose on the chargee, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notices to the chargor any time a sale was suspended to accommodate him. If such were a legal requirement, no chargee in his right mind would suspend a projected sale, as a matter of favour or indulgence to a defaulting mortgagor."**

70. A second complaint in regard to the sale was that the Bank failed to revalue the suit property prior to the purported auction and that the property was sold at an under value.

71. The property was sold on 27th March 2002. The Bank's case is that prior to that, the Bank had instructed Pinnacle Valuers to advise it on the open market value and estimated forced sale value of the property. In a valuation dated 13th April 2002, (P. Exhibit 1 pages 39-44) the valuer returned the following advise:-

(i) Current open market value …… Kshs. 1,180,000/=

(ii) Forced sale value ……..... Kshs.700,000/=

72. The Plaintiff doubts that this valuation was done at all.

73. Paul Ngugi Njathi (DW 4) a director of Pinnacle Valuers testified. He stated that he carried out the valuation. He had occasion to compare his report with that of Wigatap Agencies carried out on 11th April 2002 on instructions of the Plaintiff. He observed:-

"Plaintiff's valuation – Page 58. I have looked at this report. I picked the following issues:-

i The valuer visited property one year after our valuation.

ii Property had piped water and electricity connected. But during our visit these had not been connected the property.

iii Waste water disposal to septic tank. During our visit no septic tank instead a pit latrine was used.

iv 2 structures on plot. He identified it as a guest wing but we called it an extension. But this is not material.

v During our inspection 2nd building was 75% complete whereas the other valuer was silent on level of completion. So we assumed it was completed.

vi Valuer did not give measurements of buildings. We do not know what plinth areas he used.

vii Valuer noted that the subject plot was larger than area on title. I checked the area. Still ¼ of acre. We go by recorded area used in title search.

We looked at the property objectively. We used Kshs.9,500/= per square meter. Prevailing market rate at that time. We also have 3 comparable. I stand by our report."

74. The Plaintiff's counsel submits that Pinnacle Valuation is fraudulent because it did not capture the development on the land. Counsel submits:-

"The Plaintiff would in no circumstance develop the property after April 2001 when the same was sold and had even been auctioned in March 2001."

75. I think counsel meant auction of March 2002. As to whether they may have been developments after the valuation of 13th April 2001, it is common ground that the Plaintiff has never lost possession of the property notwithstanding the sale and the argument that she would not have developed it only because the property had been auctioned is not logical. She had possession of the property and she could possibly have made improvements to it even after the valuer from Pinnacle visited it.

76. Counsel further assailed the report for two other reasons that:-

i. The valuation does not provide the date of instruction.

ii. The auctioneer neither testified that he received a second valuation before the second auction nor that the first auction was done without prior valuation.

77. On the date of the instructions, DW 4 stated:-

"The date of instruction is not in the report and I forgot to carry letter of instructions."

I understand the valuer to be saying that the date of instruction would be in the letter of instructions and not in the report. Even looking at the valuation commissioned by the Plaintiff, the dates that are captured are the dates of inspection and the date of the report itself. The report does not have the date of inspection. What is good for the goose is also good for the gander!

78. As to whether the auctioneer testified on the second valuation, I have noted that in his evidence the auctioneer makes reference to that report. He says:-

"Non-agreed list – page 39 – 45 valuers were Pinnacle Valuers Ltd …. Date of valuation was 13th April 2001."

79. From my analysis above, the Court has no reason to doubt the bona fides of the valuation of 13th April 2001. And as the law in Rule 11 1(b) (4) of the Auctioneers Rules required a current valuation to be within 12 months of an auction, I find and hold that the valuation of 13th April 2001 was a current valuation for purposes of the auction of 27th March 2002.

80. In similar breath, the Court holds that the sale price of Kshs.703,000/= was not an under sale as it was more than the forced sale value of Kshs.700,000/=.

81. Next are issues surrounding the day of the auction. The Plaintiff's case is that the auction was conducted by an unqualified person. It was Mary's testimony that she attended the auction at 10.00am accompanied by her husband, Francis Kibicho. She testified:-

> "I know Joseph Gikonyo. He did not conduct the auction. It was conducted by Mr. Odhiambo. I am telling the truth."

82. There was then the evidence of Gikonyo (DW 1):-

> "I personally conducted the auction in the presence of my assistant, Mr. Odhiambo who distributed posters, handbills pertaining to the auction, rang the bell and also helped register the participants at auction."

83. Under cross-examination, the witness stated:-

> "Other than myself other people played a role in the auction. The recording is of prospective bidders and other participants. This was done by Mr. Odhiambo. He recorded presence of Geoffrey Kagia. Both myself and Odhiambo recorded the bids as they were made."

84. The Plaintiff's counsel submits that there are reasons why it is not tenable that the 2nd Defendant conducted the auction. First, that he had two auctions scheduled on the same day and time. One in Kikuyu and another in Kitengela. Counsel argues that there is no indication (evidence) that the auction in Kitengela did not take place and that the auctioneer could not be in two places at the same time.

85. The Plaintiff states that other reasons buttress her position that the 2nd Defendant did not personally participate in the auction:-

> a). The testimony of PW1 was corroborated by the testimony of PW2, Geoffrey Gathu Kagia. PW1 and PW2 testified that one Mr. Odhiambo was the one conducting the auction. It was not in dispute that the said Odhiambo was present at the said auction. DW1 did not dispute that the two were in the scene of the auction.
>
> b). DW1 and DW2 gave conflicting accounts of the auction in terms of what was paid as deposit and when. DW1 told the court that only deposit was paid before the fall of the hammer. He then changed the story and said at the fall of the hammer and explained that the two incident happed at the same time. DW2 who was present when DW1 was being cross examined tried to fill the gap on the DW1 evidence. However, she her statement indicated, which she confirmed that she gave out a bankers cheque for the sum of Kshs. 176, 000 after the fall of the hammer.
>
> c). Both DW1 and DW2 testified that after the fall of the hammer, nothing else happed because of altercation and they fled the scene to unknown location.
>
> d). The records of bids tabled in court were typed. The records of proceedings and bids at the recorded at the auction were never produced. DW1 confirmed that even the certificate of sale was filled by a Mr. Odhiambo.
>
> e). PW1, PW2, DW1 and DW2 testified that the auction took place the scheduled time. This means that the 2nd Defendant did not conduct another auction in a different place and travel to conduct the botched auction."

86. Once the Plaintiff's counsel was done with cross-examining the 2nd Defendant, the Court took him on the fact that he had on the day and time of the impugned auction arranged two auctions. The impugned one at Kikuyu and another at Kitengela. The question and answers are in the transcript (Pages 34 -36) of the Court proceedings of that day. The answer by the 2nd Defendant was that the auction at Kitengela did not take place as it was called as a bluff to scare the banks debtors into paying. Counsel for the Plaintiff did not press the matter further at hearing.

87. This Court is asked by the Plaintiff not to believe that explanation for reasons set out in paragraph 86 above. Let me interrogate those further.

88. The Court is told that Plaintiff and PW 2 gave corroborative evidence that it was Odhiambo who conducted the auction. In her testimony Plaintiff stated:-

> "I know Joseph Gikonyo. He did not conduct the auction. It was conducted by Mr. Odhiambo."

89. However, when PW2 testified he did not name or refer to the person who conducted the auction. Unlike what counsel for the Plaintiff submitted, the account of the Plaintiff in this respect was not corroborated. That does not help the Plaintiff's case.

90. The other reason this Court is asked to draw an inference that Odhiambo conducted the auction is the alleged conflicting account between the 2nd Defendant and DW 2 on how the deposit was paid. The 2nd Defendant had testified:-

> "25% deposit was paid at the fall of the hammer at the venue ….we got the deposit first before the lowing of the hammer."

He explained:-

> "The falling and presentation of deposit are done at the same time. The rationale is to prevent scuttling of the sale by spoilers who would bid the highest and fail to pay the deposit."

91. On her part the 3rd Defendant stated:-

> "I paid the deposit at the fall of the hammer."

But on cross-examination she was pointed to paragraph 15 of her statement which reads:-

> "That after my successful bid and the fall of the hammer, there was raising of voices by an unsuccessful bidder (whose identity I do not remember) and the Auctioneer informed me at that juncture that I needed to pay the requisite deposit of the purchase price which I did by banker's Cheque No. 570863 for Kshs.176,000/= drawn on account of Standard Chartered Bank (k) Limited – Yaya Centre Branch – *See page 35 of the non-agreed list of Documents*). I was also required to sign a memorandum of the Sale and an instrument that contained the particulars of the subject property."

The witness then conceded that this gave an impression that she paid the deposit after and not on the fall of the hammer. There is an inconsistency. Is this contradiction sufficiently material and significant for this Court to hold that it was Mr. Odhiambo and not the 2nd Defendant who conducted the auction?

92. This Court has agonized over the matter. This allegation is tied to Mary's assertion that the 3rd Defendant did not make the bid herself but that the bid and payment was made on her behalf by one Nyagah. It is also tied to the allegation that the 3rd Defendant rode to the auction with the auctioneer in one car, registration KAN 553G. All these to impute a fraudulent collusion between the person who conducted the auction and the 3rd Defendant. An allegation of fraud requires strict proof on the high standard of beyond a balance of probabilities yet not as involved as beyond reasonable doubt.

93. The 2nd Defendant was extensively cross-examined while the cross-examination of the 3rd Defendant was much less intense. The cross-examination did not break the witnesses and the only inconsistency it was able to elicit was the point the deposit was paid. This in my view is not sufficient for the Court to hold that it <u>was not</u> the 2nd Defendant who conducted the auction or that there was collusion between a Mr. Odhiambo and the 2nd Defendant. Put differently, the evidence failed to muster the threshold required for proof of fraud.

94. At the same time the other allegation that the auctioneer refused any bid beyond that of Kshs.703,000/= allegedly made by Nyagah on behalf of the 2nd Defendant was refuted by the Defence witnesses. It was the word of one set of witnesses against that of the other without any overawing the other. The heavy responsibility resting with the Plaintiff. This Court is unable to find a flaw in the auction.

95. There is a complaint by the Plaintiff that she was not paid her terminal dues and/or benefits, yet the documentary evidence on record does not support the allegation. It was the testimony of Vera Omondi (DW 2) that the Plaintiffs terminal benefits of Kshs.38,966.45 were duly credited into the Plaintiff's loan account while her accrued 14.5 leave days was added to her payment for accrued leave. The workings of this amount is at Page 76 of P. Exhibit 1. As to pension and provident funds, the witness produced a bank statement showing a credit of Kshs.232,274.35 on 27th October 1999 (Page 84 P. Exhibit 1). In regard to these and on cross-examination she stated:-

> "Page 76 – computation of terminal benefits.
>
> Page 81 – 84 – are a statement in respect of my house. At page 76 the amount was credited to my house loan account. After my dues were credited, the amounts outstanding was Kshs.1,354,390.75. At the time I left to the Bank, I was indebted to the Bank to the above extent."

96. This evidence and admission by the Plaintiff are a stark variance with her claim of unpaid dues and benefits.

97. There is little to say on the 3rd Defendant's counterclaim. This Defendant has proved that she was a bona fide purchaser of the suit property at the public auction. It is agreed that she did not take possession of the property notwithstanding that she would have been entitled to upon purchase. The deposit for the property was paid on 27th March 2002. It is unclear when the balance of the purchase price was made but no complaint was taken up by any of the parties in that respect. The transfer of the property to the 3rd Defendant by the Bank was effected on 10th June 2002. On 18th June 2002, the lawyer for the 3rd Defendant notifies the Plaintiff to give up possession of the house within 7 days of the letter. The Plaintiff defied the notice and 19 years hence is still on the property illegally. The Plaintiff has been in trespass over this period as her occupation was not permitted by the new owner of the property.

98. The aggrieved purchaser now seeks not only possession of the land but compensation in general damages. The former is the more straightforward to grant in view of the Court's finding that the Plaintiff is in wrongful possession. Trespass to land is actionable without proof of loss. That said, in the absence of proof of actual loss, the offended party is unlikely to get anything more than nominal damages. Here, the 3RD Defendant simply testified:-

> "I have lost income or other commercial or any benefit at all for the last eighteen(18) years, which grossly unfair in the eyes of justice ,taking account that I had already paid the full purchase price to the 1st Defendant''

The income lost was not proved and the Court is without a basis to assess the general damages.

99. Even if the 3rd Defendant's action fell in the category of actions where damages for trespass could be assessed from the benefit accruing to the tortfeasor (**Christopher Gill Sinclair and another and Brian Gavaghan and 2 others** 2007 EWCH 2256(CH)), still there was no proof of the monetary benefit the Plaintiff has obtained from her illegal occupation of the suit property. In the result, the 3rd Defendant will have to make do with nominal damages.

100. The upshot is that the Plaintiff's suit is dismissed with Costs to the three Defendants. The 3rd Defendant's Counterclaim against the Plaintiff succeeds in the following terms:-

100.1. An order of injunction does hereby issue restraining the Plaintiff by herself, servants or agents or otherwise from remaining on or continuing in occupation of land known as Muguga/MugugaT.440.

100.2. So as to give effect to order 100.1 above, the Plaintiff shall give vacant possession of Muguga/Muguga T.440 to the 3rd Defendant within 30(thirty) days of this Judgment.

100.3. Nominal damages of Kshs.100,000/= to the 3rd Defendant as against the Plaintiff with interest thereon at Court rates from the date of this Judgment.

100.4. Costs of the Counterclaim to the 3rd Defendant against the Plaintiff.

Dated and Signed this 5th Day of July 2021

F. TUIYOTT

JUDGE

Dated, Signed and Delivered at Nairobi this 7th Day of July 2021

D. S. MAJANJA

JUDGE