



Kuniara v Industrial and Commercial Development Corporation & 2 others (Civil Case 326 of 2008) [2021] KEHC 154 (KLR) (Commercial and Tax) (7 October 2021) (Judgment)

Neutral citation: [2021] KEHC 154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 326 OF 2008
F TUIYOTT, J
OCTOBER 7, 2021**

BETWEEN

RUTH NJERI KUNIARA PLAINTIFF

AND

**INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION 1ST
DEFENDANT**

WATTS ENTERPRISES 2ND DEFENDANT

**CATHERINE NJERI NGUNJIRI (SUING AND BEING OF ANTHONY N.
NGUNJIRING SUED AS THE LEGAL REPRESENTATIVE OF ANTHONY N.
NGUNJIRI 3RD DEFENDANT**

JUDGMENT

1. Ruth Njeri Kuniara (the plaintiff or Kuniara) fights to retain ownership of property known as LR. No. 14225/171 (the Suit Property).
2. The suit property was sold by Watts Enterprise (the 2nd defendant), as agents for Industrial & Commercial Development Corporations (the 1st defendant or ICDC), to Anthony N. Ngunjiri (Ngunjiri or the Deceased) in purported exercise of its statutory power of sale. Ngunjiri passed away on 21/09/2011 and Catherine Njeri Ngunjiri is the legal representative of his estate.
3. On or about 18/9/1996, Kuniara took a loan facility from ICDC for which a charge over the suit property was taken as security. She fell into hard times due to adverse weather and was soon in arrears.
4. She asserts that she has since offered to pay the loan but the defendant has charged punitive and unconscionable interest in violation of the [Banking Act](#).



5. She challenges the sale as being unlawful, irregular and fraudulent and cites the following particulars:-

- i. Failing to carry out a proper valuation or at all of the suit property prior to the sale.
- ii. Failing to serve the Plaintiff with a statutory notice or at all as required by law.
- iii. Selling the property below its value.
- iv. Varying the terms of the contract unilaterally and without the Plaintiff's knowledge, consent, or otherwise.
- v. Charging invalid and unknown charges, interest rates and levies in violation of the law and with intent to make it difficult for the Plaintiff to raise the loan amount.

6. In the end she seeks the following orders:-

- a. An order of permanent injunction restraining the 3rd Defendant and/or his authorized employee, agents and/or servants from harassing, evicting, transferring, selling, charging, alienating, disposing and/or otherwise interfering with the Plaintiff's use, ownership, occupation and possession of all that property situated at and known as L.R. No. 14225/171 Kahawa, Nairobi.
- b. A declaration that the purported sale of all the property situated at and known as L.R. No. 14225/171 Kahawa, Nairobi to the 3rd Defendant by 1st Defendant was unlawful, fraudulent and void ab initio.
- c. Damages.
- d. Costs of this suit and interest.
- e. Such further or other relief as this Honourable Court may deem fit to grant.

7. In reply to the claim, the 3rd defendant defends the purchase of the property by the Deceased. It is averred that he was the highest bidder and subsequently paid the purchase price. The estate of the Deceased is aggrieved that the plaintiff has refused and/or neglected to give vacant possession of the suit property and seeks the following orders:-

- a. An Order for eviction do issue against the Plaintiff and every other person claiming through the Plaintiff or under her be bound by the said Order and vacant possession be given to the 3rd Defendant of all that property known as L.R 14225/171 (I.R 53502) situated in the city of Nairobi within 30 days from the date of the Order and the OCPD Kasarani Police Station do assist the 3rd Defendant in giving effect to the Order.
- b. Mesne profits at Kshs.40,000/= per month since the purchase on 14th May 2008 until vacant possession is given to the 3rd Defendant.
- c. Costs of this suit and counterclaim.
- d. Interest on (b) and (c) at Court rates.
- e. Such other or further relief of this Honourable Court may deem fit to grant.



8. The Defence by ICDC is that the plaintiff defaulted in repaying the facility and it sold the charged property in exercise of its statutory power by sale on 14th May 2018. It avers that this was after it properly issued a statutory notice on 29th November 2006, sent by registered post to the plaintiff's known address of P.O. Box 55, Loitokitok and also by hand delivery duly acknowledged by the plaintiff.
9. It denies all the alleged illegalities in respect to unlawful variation of interest rate; charge of unlawful interest and none valuation of the charged property before it was sold.
10. Three witnesses testified. The plaintiff, Zephania K. Rono (DW1) for the Bank and Catherine Njeri Ngunjiri. I need not rehash their evidence but instead propose to discuss it where it helps resolve the controversy raised in these proceedings.
11. Let me, however, in brief, set out some undisputed facts.
12. The plaintiff took a loan of Kshs.1,500,000/= for ICDC and secured it through a charge over L.R No. 14225/171 to ICDC. She readily admits that she was in default of repayment but blames it on adverse conditions caused by a severe draught in 1996 and then almost, by paradox, on El-nino floods in 1997. In her letter of 23rd March 1999 (D. Exhibit Page 33) to ICDC, she states as much but gives further reasons for the default, she blames it, as well, on an apparent collapse of the national economy in 1998 and that she is a single mother of ten children, all school going.
13. What is to be noted however is that the plaintiff did not plead that the performance of her contract with the Bank was frustrated by weather conditions or the collapse of the economy. She cannot therefore be permitted to set up such a case. She is bound by her pleadings.
14. What those pleadings reveal are the following to be issues for determination:-
 - i. Did ICDC charge unlawful interest rates, levies or other charges?
 - ii. Did ICDC charge unconscionable interest rates?
 - iii. Did ICDC fail to serve the plaintiff with a statutory notice?
 - iv. Did ICDC fail to carry proper valuation of the suit property prior to the sale?
 - v. Was the exercise of statutory of sale by ICDC lawful?
 - vi. What are the proper orders to be made in respect to the prayers in the Plaintiff, Counterclaim and Costs?
15. At the hearing, no evidence was led as to how the fees, interest, rates, levies charged by ICDC were either unconscionable or unlawful. Not once in her evidence did the plaintiff allude to this. Not a single question was asked of the witness for ICDC in this regard. This aspect of the plaintiff's case fails without much ado.
16. The plaintiff being in default, ICDC was entitled to proceed with the exercise of its statutory powers. The suit property was, at the material time, registered under the *Registration of Titles Act* (now repealed). The legal regime that set out the statutory power of sale and how it ought to be triggered and exercised for land registered under the Registration of Titles Act was the Indian Transfer of Property Act.
17. Section 69A of this latter statute provided:-

“ Regulation of exercise of mortgagee's statutory power of sale.



- (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-
- a. notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or
 - b. some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
 - c. there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon."

18. ICDC, in meeting the plaintiff's case, asserts that it issued the required statutory notice upon the plaintiff on 29th November 2000 through registered post and also by hand delivery duly acknowledged by the Plaintiff.
19. On the evidence, the hand delivery was made by one Japhet Kahindi who sworn an affidavit of service (D. Exhibit Pages 43 and 44). To be noted however was that the notice was served, not on the plaintiff, but her son Godfrey Gathera.
20. In respect to the service by registered post, the notice was sent to the plaintiff using Postal Address Box No. 55 Loitokitok (E. Exhibit 45). There is no dispute that this is the address of the plaintiff. The plaintiff herself had used that address in her letter of 23rd March 1999 (D. Exhibit Page 33) to the Bank. Also produced by ICDC is the certificate of posting of the registered mail (D. Exhibit Page 46). This is satisfactory evidence of service by registered post.
21. So that even if there was to be doubt as to propriety of service by personal delivery, the service by way of registered post cannot be faulted. The issue of service by statutory notice is resolved in favour of ICDC.
22. Further evidence is that Watts Enterprises, on instructions from ICDC, duly issued a 45 days' notice dated 10th March 2008 upon the plaintiff. On a copy is her signature (D. Exhibit Page 59). Although not raised by the plaintiff there appears to have been compliance of the law on this aspect by ICDC.
23. It is common ground that the property was sold to the Deceased in a public auction held on 30th April 2008. Just three months earlier, on 11th February 2008, Kittundu & Co. Valuers, at the request of ICDC, had carried out a valuation of the property. Having inspected the property on 6th February 2008, the valuer returned a forced sale value of Kshs.1,300,000/=.
24. The law then was that for a valuation to be considered current for purposes of a forced sale, it needed to be done within 12 months of sale (See Rule 11(b) (x) of the Auctioneers Rules). ICDC had therefore kept within that statutory period. Again, ICDC cannot be faulted.
25. The Deceased bought the property for Kshs.1,400,000/=, Kshs.100,000/= above the forced sale value. Still, the plaintiff thought the valuation of Kshs.1,300,000/= to be an undervaluation and the sale to be an under sale. In support of this aspect of her case she produced a valuation report dated 31st March 2020 (P. Exhibit Pages 23-31). In it, Apex Valuers Limited opines that the open market value for sale



purposes of the property as at 1st April 2008 was kshs.4,500,000/= . The valuer did not testify and so had no opportunity to defend his professional opinion.

26. What is curious is that notwithstanding that the plaintiff filed this suit on 16th June 2008, a month after the sale of the property, she did not consider it necessary to commission a valuation then. What she produced was a valuation made just shy of 2 years after the sale. This Court now has to compare two professional reports, that of the ICDC which was current at the time of sale and that of the plaintiff which was based on a retrospective opinion. In this circumstances, I am unable to say that the valuation commissioned by ICDC did not reflect the true forced sale value of the property at the time of sale. The plaintiff has been unable to establish this limb of the case.
27. The inevitable answer to be reached is that the suit property was lawfully sold to the Deceased. The property was registered in favour of the Deceased on 3rd November 2008. That notwithstanding neither the Deceased nor his estate has taken possession of the suit property because of the plaintiff's resistance. It is 13 years since the Deceased bought the property. It is now time for the plaintiff to give way, to yield possession of the property to the estate of the Deceased.
28. Although the estate of the Deceased also seeks an order of mesne profits at Kshs.40,000/= per month from 14th May 2008 (the date of purchase) until vacant possession is given, it did nothing to prove the proposed profit of Kshs.40,000/=. That claim fails.
29. This then are the final orders of the Court:-
 - i. The plaintiff's claim fails with costs to the 1st, 2nd, and 3rd Defendants.
 - ii. The counterclaim of the 3rd defendant succeeds to the extent that the plaintiff and every other person claiming through her or under her to give vacant possession of the property known as L.R. 14225/175(I.R 53502) to the 3rd defendant within 60(sixty) days of the date of this judgment.
 - iii. Costs of the Counterclaim to the 3rd defendant to be paid by the plaintiff.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

