



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA MERU**

**CIVIL SUIT NO. 31 OF 2018**

**DAVID PIUS MUGAMBI ..... PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**ISAAC GITONGA RINGERA T/A VIEWLINE AUCTIONEERS ...2<sup>ND</sup> DEFENDANT**

**DR. JITESH DODHIA .....3<sup>RD</sup> DEFENDANT**

**J U D G M E N T**

1. The plaintiff instituted this suit vide a plaint dated 15/3/2011 which was subsequently amended and the suit finally tried vide a Further Amended Plaint filed on 31/8/2017. The plaintiff's claim was that an alleged auction of 1/10/2010 and the subsequent sale of **Meru/Municipality Block II/7** ("the suit property") by the 1<sup>st</sup> and 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant was irregular and unlawful.
2. The plaintiff therefore sought a declaration that the sale of the suit property by public auction was illegal, null and void, an order for accounts to be taken, cancellation of the transfer and the re-transfer of the suit property to him. He also sought for compensation for the loss of the suit property and that the quantum therefor be determined on the basis of the cost of construction and for a permanent injunction against the defendants from disposing the suit property.
3. In their statement of defence amended on 13/7/2017, the 1<sup>st</sup> and 2<sup>nd</sup> defendant denied the plaintiff's claim in total. They contended that the plaintiff had admitted being in arrears and that the orders sought could not be granted. They contended that they had issued proper notices before the 1<sup>st</sup> defendant exercised its statutory power of sale. That in the premises, the public auction and subsequent transfer of the suit property to the 3<sup>rd</sup> defendant was regular and valid.
4. On his part, the 3<sup>rd</sup> defendant contended that he was the highest bidder at the auction held outside KCB, Meru Branch on 1/10/2010. That subsequently, the suit property was transferred to him and he was in lawful possession thereof.
5. In his evidence, **DAVID PIUS MUGAMBI (PW1)** told the Court that he purchased the suit property and was issued with a lease therefor on 21/08/1996. That he obtained a loan from the 1<sup>st</sup> defendant of Kshs. 1,000,000/= of which he paid Kshs.500,000/= but fell into arrears.
6. However, without his knowledge, the 1<sup>st</sup> defendant discharged the charge for the loan he had taken in 1997 and had the lease of the suit property extended for a term of 66 years commencing 1/1/2005. That in 2009, the 1<sup>st</sup> defendant illegally re-charged the suit property for another loan of Kshs. 1,600,000/=.
7. It was his case that he fell into arrears and the auctioneers advertised the suit property for sale by public auction. That he was never served with any statutory notice but learnt from a friend that the 1<sup>st</sup> and 2<sup>nd</sup> defendant had scheduled a public auction for the suit property on 1/10/2010 outside KCB, Meru Branch. He was unable to attend the auction as he was attending the burial of his late father. He therefore sent agents to outbid the highest bidder but they informed him that there was no auction that took place.
8. However, he later learnt that the suit property had been sold to the 3<sup>rd</sup> defendant whereby he lodged a complaint with the Meru CID. That there was no 25% deposit paid at the fall of the hammer but it was deposited in 1<sup>st</sup> defendant's account on 15/10/2010 thereby making the sale null and void. He concluded that since the purchase price by the 3<sup>rd</sup> defendant was cleared in April 2011 and title obtained on 15/3/2011, the entire transaction was illegal.
9. In cross examination, he admitted that there had been prior auctions which had been suspended for various reasons including at his own instance. That the statutory notice of sale dated 28/9/1998 had a wrong address though posted to the address given in the charge as his own.

10. **D1W1 FRANCIS KOMEN** testified that the 1<sup>st</sup> defendant had extended a loan to the plaintiff which he defaulted in repaying. As a result, on 9/04/2010 the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to advertise the suit property for sale. The 1<sup>st</sup> defendant procured a valuation report whereby the 2<sup>nd</sup> defendant issued the plaintiff with a redemption notice and scheduled the auction for 13/08/2010. However, just before the sale of the suit property the plaintiff approached the 1<sup>st</sup> defendant and requested the sale to be halted to enable him settle the outstanding amount. He however, failed to abide by the conditions set by the 1<sup>st</sup> defendant whereby it instructed the 2<sup>nd</sup> defendant to advertise the sale of the suit property.

11. This was followed by a public auction held on 1/10/2010 whereby the suit property was knocked down in favour of the 3<sup>rd</sup> defendant as the highest bidder. The 3<sup>rd</sup> defendant paid the mandatory 25% deposit on the same day by issuing two bankers cheques totalling Kshs.1,250,000/- and a Sale Agreement for the purchase and sale of the suit property at Kshs 5,000,000/= was executed. This was followed by a professional undertaking from the 3<sup>rd</sup> defendant whereby the suit property was successfully sold and transferred to the 3<sup>rd</sup> defendant.

12. **D3W1 JITESH DHODIA** told the Court that, he learnt of the auction through a newspaper advertisement whereby he attended and that was held on 1/10/2010 where there were four (4) bidders. He gave the highest bid and upon the fall of the hammer, he paid 25% of the purchase price vide two cheques which he gave to the auctioneer on the same day. He later completed the payment of the purchase price whereby the suit property was transferred to him.

13. I have considered the evidence on record and the submission of the parties. The issues for determination are; ***whether there was a lawful charge over the suit property, whether the plaintiff was issued with the requisite statutory notices, whether there was any auction on 1/10/2010, what orders should be made in the circumstances of this case.***

14. There is no dispute that the plaintiff took a loan from the 1<sup>st</sup> defendant for which he executed a charge over the suit property on 1/10/1997. The Lease over the suit property expired and after it was extended in 2005, the plaintiff admitted that he executed a Charge on 15/6/2009 for Kshs.1,600,000/- in place of the charge that had been registered against the expired lease. The subsequent charge was registered against the renewed Lease. To this Court's mind, there was a lawful charge over the suit property which had a charging clause thereby constituting the suit property a security for the advanced amount.

15. The plaintiff complained that he was not issued with the requisite statutory notices before the suit property was auctioned on 1/10/2010. The 1<sup>st</sup> defendant produced a Statutory Notice of sale dated 28/9/1998. The same was addressed to the Plaintiff at Post Office Box Number 62302, Nairobi which the plaintiff contended was not his. However, at page 29 of the 1<sup>st</sup> defendant's bundle of documents was a Certificate of posting No. 0757418. The letter is showed to have been posted to the plaintiff at Post Office Box Number 52082, Nairobi. The plaintiff admitted that the latter was his address which he had given in the charge document.

16. **Section 74 of the RLA Cap 300** (now repealed) provided as follows:-

***"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."***

17. In **Stephen Boro Gitihia v Nicholas Ruthiru Gatoto & 2 others [2017] eKLR**, the Court held:-

***"It is for the Chargee to make sure there was compliance with the requirements of Section 74(1) of the Registered Land Act and the burden was not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice, it is for the Chargee to prove that the notice was in fact sent. The bank had failed to produce stamps showing proof of posting of the registered letter(s) containing statutory notice. In the absence of proof of such posting, the sale by auction was void. A sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land sold ..."***

18. **D1W1** testified that the said statutory notice was sent to the correct address as per the Certificate of Posting aforesaid. The plaintiff neither challenged that piece of evidence nor did he deny having received the same. In the premises and on a balance of probability, I hold that the 1<sup>st</sup> defendant did issue the plaintiff with the statutory notice of sale dated 28/9/1998.

19. As at the time the said notice of 28/9/1998 was being issued, the plaintiff was hopelessly in arrears. There was no requirement in law or fact that the 1<sup>st</sup> defendant should issue the plaintiff with any subsequent statutory notices after the first one. It will be ridiculously expensive to expect Chargee to issue a Statutory Notice of sale every time an auction does not take place either for reason of part payment or any arrangement between the Chargor and the Chargee or for any other reason whatsoever. Once the initial notice is issued, the Chargor is forever put on notice that for reason of his failure to adhere to the terms of the Charge or arrears, the Chargee is desirous of exercising its statutory power of sale.

20. As regards the 45 days Notification of Sale by an auctioneer, **D1W1** produced such notices that were issued in respect of the auctions to be held on 8/11/2002, 4/4/2003 and 13/8/2010, respectively.

21. The last auction was called off in the morning of the auction vide a letter dated 13/8/2010. In the said letter, the 1<sup>st</sup> defendant the plaintiff as follows: -

***"We refer to the above matter and to the meeting held today at our offices.***

***As advised during the meeting, the bank has exceptionally acceded to your request to suspend the auction scheduled for this***

*morning. ....*

...

***Please ensure that the payments indicated in (1) and (2) above are made as stipulated failure to which legal action will be reinstated”.***

22. The legal action to be reinstated in this case was the suspended auction. It would seem that the plaintiff did not perform his part of the bargain and on 8/9/2010, on instructions of the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant advertised the suit property for auction on 1/10/2010 at 10.30 am. It is after this that the suit property was finally sold.

23. The Notification of Sale by the 2<sup>nd</sup> defendant dated 27/5/2010 served and received by the plaintiff on the same day was neither challenged nor denied by the plaintiff. That Notice was in accordance with **section 15 of the Auctioneers Rules**. The auction set for 1/10/2010 was advertised in accordance with the law. I therefore find that the statutory notices required under the law were duly issued by the 1<sup>st</sup> and 2<sup>nd</sup> defendant.

24. The plaintiff complained that there was no auction that was conducted on 1/10/2010. That the 2<sup>nd</sup> defendant had failed to appear and testify to the fact that an auction had taken place by producing the bidding schedule. He further complained that the mandatory 25% deposit was not paid and that the sale that was completed in March, 2011, way out of the time agreed between the 1<sup>st</sup> and 3<sup>rd</sup> defendant. He therefore contended that these vitiated the sale.

25. The cardinal rule of evidence is that, he who alleges must prove. That is the basic requirement of **sections 107 and 108 of the Evidence Act**. That burden of proof does not shift at whatever stage of the trial. All that shifts is the incidence of proof. Once the 1<sup>st</sup> and 2<sup>nd</sup> defendant denied the plaintiff's allegation and averred that an auction was conducted on 1/10/2010, the incidence of proof shifted back to the plaintiff to prove his allegation.

26. In the present case, the plaintiff alleged that he was informed by a friend that an auction would be held on the material day outside KCB, Meru Branch. That he sent agents to the auction to outbid the highest bidder. That the said agents later told him that no auction was held.

27. The plaintiff did not give the names of the alleged agents for the Court to ascertain if they existed or not. Further, the plaintiff failed to call the alleged agents to testify on how they knew that there was no auction. It is only if there was such evidence to the effect that no auction took place that the attendance of the 2<sup>nd</sup> defendant would have been necessary. This is so as the incidence of proof would have shifted to the 1<sup>st</sup> and 2<sup>nd</sup> defendant to disprove the plaintiff's allegations.

28. There was the evidence of the 3<sup>rd</sup> defendant that he attended the auction on the material day and that there were 4 bidders. There was no reason not to believe his testimony.

29. In this regard, the Court holds that; the plaintiff was aware of the public auction of 1/10/2010. He did not attend the auction for reason of the burial of his father. The auction proceeded and the 3<sup>rd</sup> defendant was the highest bidder to whom the suit property was knocked down.

30. The other complaint was that the 25% deposit was not paid on 1/10/2010. There were two bankers cheques that were produced in evidence. They were for a total sum of Kshs.1,250,000/-. They were issued by ABC Bank on 1/10/2010 for the Account of the 3<sup>rd</sup> defendant. That was as good as money paid. The 3<sup>rd</sup> defendant's account with ABC Bank must have been debited with the said sum on the said date. The said amount was therefore paid by the 3<sup>rd</sup> defendant on the same date. The delay in depositing the same had no effect. In any event, it was explained that they were sent to Moi Avenue, Nairobi where the plaintiff's account was which led to the delay in their presentation.

31. As regards the delay in payment and transfer of the suit property to the 3<sup>rd</sup> defendant, that does not vitiate the transaction between the 1<sup>st</sup> and 3<sup>rd</sup> defendant. The plaintiff cannot seek to vitiate the transaction in which he was not a party. To this Court's mind, if any of the parties to the contract between the 1<sup>st</sup> and 3<sup>rd</sup> defendant failed to strictly adhere to its terms, that is for the parties thereto to decide. It cannot be a basis for the plaintiff who admittedly failed to repay a loan to nullify a lawfully conducted auction.

32. In view of the foregoing, the plaintiff has failed to prove his case to the required standard. The same is dismissed with costs.

**DATED** and **DELIVERED** at Meru this 16<sup>th</sup> day of January, 2020.

**A. MABEYA**

**JUDGE**