

8. Ultimately the Plaintiffs pray or Judgment against the Bank for:-

- a. A declaration that its actions and dealings with the Plaintiffs was fraudulent, unlawful and the statutory Notice of sale was in the circumstances null and void.
- b. A permanent injunction restraining the Defendant from unlawfully selling or alienating LR No. 25591.
- c. Compensation equivalent to the value of the property known as LR N. 25591 and exemplary damages to the Plaintiffs for all the inconveniences, pain, public embarrassment and despair, irreparable loss and damage.
- d. General damages.
- e. A declaration that the Defendant purported exercise of its statutory power of sale over the suit property was fraudulent, illegal, unlawful and triggered with gross irregularities and bad faith.
- f. A permanent injunction restraining the Defendant, its surrogates, servants, agents or employees from disposing of, transferring or dealing in any manner whatsoever with the suit premises.
- g. An order directed at the Chief Land Registrar to cancel entries Nos. 5 and 6 with regard to the suit premises.
- h. Costs.

9. The Bank denies the claim and states that it offered the 3rd Plaintiff various financial and banking facilities which included overdraft, letters of credit, bank guarantees, loan account, personal current account and personal savings account. That in accordance with the requirements of Central Bank of Kenya Prudential Banking Guidelines separate loan accounts were opened for each facility.

10. In regard to the sale to Space and Style Ltd., the Bank defends it as having acted in exercise of its statutory power of sale and in the face of continuous default on the part of the Plaintiffs.

11. The Bank states that a valuation of the property was conducted by a professional valuer who ascertained the forced sale value at Kshs.12,000,000/= and so the sale at Kshs.15,000,000/= was above the forced sale value. The Bank further gives its answer to the particulars of illegality, bad faith, fraud, wilful negligence and recklessness. For instance it contends that the terms of the letters of offer and charge documents executed by the Plaintiffs provided for variation of the rate of interest at its discretion. It asserts that the sale of the property was by way of transfer by charge in exercise of its statutory power of sale as provided by law.

12. Only two witnesses testified in this matter. The 3rd Plaintiff (**PW1**) and Michael Ritho (**DW1**) for the Bank. Highlights of their evidence in resolving the issues that arise for determination are discussed. Those issues proposed by the Plaintiffs in their submissions and embraced by the Defendant are:-

- i. Whether valuation of the property was accurate?
- ii. Whether interest imposed on the Plaintiffs was legal?
- iii. Whether the sale by private treaty was procedural?
- iv. Whether the Plaintiffs were accorded a fair opportunity to redeem the suit property?

13. The Court will deal with the issues beginning first with the pre-sale events.

Although the 3rd Plaintiff had complained that the Bank had opened and operated multiple accounts without involving her, she does not seem to have taken up this issue with much conviction in her submission. It is submitted on her behalf that:-

“Upon further investigations the 3rd Plaintiff discovered that the Bank had been unlawfully opening and operating several other accounts in her names and details without her knowledge or consent. The Defendant was removing money from the 3rd Plaintiff legitimate account to service loans in these sham accounts that the Plaintiff knew nothing about”.

14. These are serious allegations. Allegations that the Bank committed a fraud on her. Yet in her evidence the 3rd Plaintiff did not provide any proof of money been removed from her legitimate account into the alleged sham accounts. Allegations of fraud must be sufficiently proved and not left for inference from the facts (**see Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR**).

15. Another issue raised in the pleadings but not pressed at submissions was the allegation that the Plaintiff was not furnished with statements of her accounts by the Bank. But in cross-examination she was confronted with the Bank’s lawyer’s letter of 11th June 2007 (**D. Exhibit Page 114**) in which the advocate forwarded copies of some statements to Kipkorir Titoo & Kiara, her erstwhile advocates. She retorted;

“I was not happy about these statements. It was not adequate”.

16. However, in response to this letter her advocates write back on 22nd June 2007 (**D. Exhibit Page 125**) without raising a complaint about the inadequacy of the statements. Indeed in that letter her advocates see confirmation that the outstanding sum as at 31st May 2007 was Kshs.18,149,684/=. Whilst PW1 stated that she was unhappy about the letter and therefore changed advocates, there is no evidence that the contents of the letter were countermanded by her or her new advocates.

17. I now turn to the issues that both sides asked this Court to determine. The first being whether the interest rates imposed on the Plaintiff was legal. In their pleadings, the Plaintiffs had taken this issue as follows against the Bank:-

“Fraudulently and unlawfully varying the agreed rate of interest on the 3rd Plaintiff’s facilities unconsciously and without any justification or colour of right whatsoever, much to the loss and detriment of the Plaintiffs”.

18. In their submissions, the Plaintiffs point to two specific issues. First, that the Bank imposed interest in defiance of Section 44 of the Banking Act which stipulates that:-

“No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.”

Second, that other interest, charges, fees and penalties not provided in the charge document were imposed by the Bank.

19. On the first matter, the Defendant’s Counsel submits this issue neither featured in the pleadings nor at the trial and that the Plaintiffs should be precluded from raising it in the submissions.

20. So was breach of Section 44 of the Banking Act or other provisions of the Banking Act sufficiently pleaded? Order 2 Rule 10 requires the following particulars of pleading:-

10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —

a. particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

2. The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

3. Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party —

a. where he alleges knowledge, particulars of the facts on which he relies; and

b. where he alleges notice, particulars of the notice.

4. An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.

5. No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate.

6. Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings.

21. One objective of the rule is that a party should clearly state its case so that the other said has sufficient notice of the case it is to answer or the defence that meets his claim or cause of action. Surprise and ambush negates fair trial.

22. The manner in which unlawful interest was pleaded has been reproduced in paragraph 17 of this decision. As is evident, that variation of interest was counter statute or in the least is non-compliant with Section 44 of the Banking Act is neither pleaded expressly or by implication. Again not in her written statement nor in her oral testimony does PW1 allude to the provisions of Section 44 of the Banking Act. To take the matter up at the tail end of the proceedings, during submissions, denies the Bank an adequate opportunity of responding to it. This Court therefore agrees with the Bank that the issue was not adequately pleaded.

23. Yet even if I was wrong on that finding, the Plaintiffs did not lead evidence on how the interest rate was varied from that contracted so as to run afoul of the provisions of Section 44 of the Banking Act.

24. The dearth in evidence is also apparent in the related issue that the Defendant introduced other interests, charges, fees and penalties not contemplated by the charge document. Which are these interest rates, charges, fees and penalties? There was no evidence at all in this regard and the first issue is resolved in favour of the Defendant.

25. There is evidence that the 3rd Plaintiff did not keep up with the repayment of the facilities granted to her. On 26th July 2006 (**P. Exhibit Page 107**) and 2nd August 2006 (**P. Exhibit Page 108**), for example, her lawyers make proposals on repayment of the debt. There is further admission of default when the Plaintiffs' lawyers (**See letter of 22nd June 2007 – D Exhibit Page 125**) seek a confirmation that the debt as at 31st May 2007 was Kshs.18,149,684/=.

26. Of further significance regarding this last letter was that it came after the statutory notice of 13th February 2007 (**D. Exhibit Page 109, 110**) had been duly served on the mortgagors as required by section 69A of the now repealed Transfer of Property Act. Receipt of this notice is admitted by the Plaintiffs. The notice gave opportunity to the Plaintiffs to redeem the subject property within 3 months of the notice failing which the Bank would exercise its statutory power of sale. The Court cannot find any merit in the Plaintiffs contention that they were not accorded a fair opportunity to redeem the charged property.

27. I turn to the third issue. Was the sale by Private Treaty unprocedural? The charge was registered under the now repealed Registration of Titles Act and the law applicable in respect to the mortgagee's exercise of its statutory power of sale was to be found in Section 69(1) of the repealed Transfer of Property Act:-

“A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage- money, or part thereof, immediately due and payable.”

28. It is common ground that the subject property was sold by the Bank to a third party, Space and Style Ltd, by way of private treaty. It is also not in contention that the law allowed a mortgagee or a person acting on his behalf to sell the charged property by private treaty.

29. The point of divergence is whether that mode of sale can be embarked on by a mortgagee without previous unsuccessful attempts by way of public auction. The Plaintiffs relies on decision in **Joseph Siro Mosioma - vs- Housing Finance Company of Kenya & 3 Others [2008] eKLR.**

1. My interpretation of section 69(1) of the Transfer of Property Act is that a mortgagee whose money has become due is empowered to sell the mortgaged property either together or in lots, by public auction or by private contract. My understanding is that there can be no sale by private treaty when there has been no previous attempts to sell the subject property by public auction. I agree that a mortgagee exercising his power of sale pursuant to the provisions of section 69(1) of the Transfer of Property Act may do so by private treaty but there must be evidence/testimony that there were previous attempts to sell by public auction which was unmeritoriously thwarted by the mortgagor. There must be evidence that the bank has been unsuccessful in previous attempts because of the conduct of the mortgagor, hence the private sale is done due to the conduct of the mortgagor to frustrate the salutatory power of sale.

2. It seems to me that under Section 69(1) of the Transfer of Property Act, a mortgagee cannot at his convenience deal with the mortgaged property in the manner he deems fit unless the conduct of the mortgagor is wanting. The words used is shall have powers to sell without the intervention of the court, when the mortgage money has become due provided the first option is exercised which is by public auction. Section 69(1) of the Transfer of Property Act does not use the words either but by public auction or by private treaty. The section also uses the words to sell or to concur with any other person in selling, therefore my view is that the first option, which is mandatory is by public auction. And unless there were previous attempts which failed due to the conduct and action of the mortgagor, then there is absolutely no reason to revert to sale by private treaty. It is therefore my judgement that a plain reading of section 69(1) of the Transfer of Property Act does not automatically and at the first attempt give a right to the mortgagee to sell by private treaty.

30. The Bank prefers the view taken by Azangalala J (as he then was) in **Elantra Properties Limited -vs- Paramount Universal Bank Ltd. & 5 others [2007] eKRL.** that the mortgagee can elect to sell by public auction or by private treaty without first attempting the other.

31. Considering the same provisions, the Court of Appeal in **Francis Mogaka Maranya v National Bank Of Kenya & another [1997] eKRL.** observed;

“Logically, the first question to be considered is whether the purported sale was lawful or irregular. In this regard, the provisions of Section 69 of the Act are clear and entitle the Bank to effect sale by private treaty. This right, in our view, is not

taken away merely because at an early stage, the Bank had advertised to sell the property by public auction. There was no plea of estoppel nor can one succeed as there is no estoppel against the statute.”

32. Whatever view this Court accepts does not change the outcome in this matter for the reason that although the Plaintiffs allege a loss as a result of the private treaty sale they have not demonstrated that loss and do not even suggest the damages to be awarded. It has not been demonstrated that the sale of the land at the sum of Kshs.15,000,000/= was at an undervalue as the Plaintiffs did not produce evidence as to an alternative value of the property at the time of sale so as to challenge the purchase price achieved in the private treaty.

33. What this Court has just held also partly answers the last issue which is whether the valuation of the property was accurate. Now, the Plaintiffs think and submit that the sale could only proceed on the basis of a reserved price based on a professional valuation carried out not more than 12 months prior to the proper sale. The basis of this, then, was Rule 11 of the Auctioneers Rule.

34. The Bank on the other hand observes that Rule 11 of the Auctioneers Rule does not apply and relies on the decision of the Court of Appeal in **Nancy Kahoya Amadiva -vs- Expert Credit Limited & Another [2015] eKLR** where it held:-

“...We have also perused the notification of sale and noted that the same is issued pursuant to rule 15 of the Auctioneer's Rules and is preceded by an Auctioneer's notice of 45 days. From the record before us, there is no evidence of such 45 day notice preceding the notification. Moreover, the notification contains a „typographic" error as to the description of the property indicating it to be LR No.209/8343/108 instead of LR.No.209/8343/107. It is worthy of note that the Indian Transfer of Property Act does not oblige sale to be subject to Auctioneer rules unlike the Registered Land Act. Moreover, rule 11 of the Auctioneer's Rules applies to sale of immovable property in execution of decree.”

35. Rule 11 1(b) of the Auctioneers Rules reads:-

b. immovable property—

i. as in (i) to (v) in paragraph (a);

ii. the land reference number, file number, plot number, or flat number, as the case may be;

iii. the area in hectares or in square metres;

iv. the user and any restrictions by statute or otherwise on the disposition of the property or any interest in it;

v. the tenure and in the case of leasehold, particulars of the landlord and the annual land rent;

vi. the location, and in the case of land situated within a township or municipality, the amount of the most recently available annual site value tax;

vii. on accurate description of improvements and developments;

viii. the names, and addresses of encumbrancers on the title together with—

a. the estimated amount due to any encumbrancer;

and

ab. the estimated amount of arrears of land rent rates and taxes;

ix. the names addresses and titles of any persons in possession of the property to be sold or any part of it;

x. the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

36. This of course is in respect to sales by public auction and if the Court were to assume that it covers public auction sales under the repealed Registration of Titles Act then, the seller would be obliged to carry out a professional valuation not more than 12 months prior to the proposed sale for purposes of establishing a reserve price.

37. I would think that there would ever be greater need for such a valuation if the sale was to be done by way of private treaty so that such a sale does not attract criticism as being opaque or conducted in bad faith or without regard to the interest of the mortgagor or in the absence of reasonable care to obtain the best price obtainable at the time of sale. So even for purposes of a private treaty, the law then was that it could only proceed on the basis of a professional valuation carried out not more than 12 months prior to the proposed sale.

38. In the matter before Court the valuation was conducted on 17th September 2007 (**D. Exhibit Pages 172 – 202**) and the sale conducted on 18th September 2008 which would be 1 day outside the 12 months period. The Plaintiff would have been entitled to damages if it had proved that the sale of that day was at undervalue. Again like many aspects of their case, the Plaintiffs failed to lay any evidence to

prove this crucial aspect of their case.

39. As would be clear now the Plaintiffs embarked on cause of action which they have been unable to proof or establish. Their case is dismissed with costs.

Dated, Signed and Delivered in Court at Eldoret this 8th Day of May 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Miss Nyaga for the Defendant.

No appearance for the Plaintiff