



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL CASE NO. 25 OF 2018

DAVID KARANJA KAMAU.....PLAINTIFF

-VERSUS-

HARRISON WAMBUGU GAITA.....1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....2ND DEFENDANT

JUDGMENT

1. The plaintiff was at all material times a director of Rupa (K) Limited and the proprietor of parcel number ***Kajiado/Ntashart/258***, said to be approximately 100 acres. Sometimes in 1999, he charged this parcel of land in favour of the 2nd respondent, a financial institution, to guarantee an overdraft facility given to Rupa (K) Limited, a facility that was renewable annually.
2. Following that overdraft facility, a dispute arose between Rupa (K) Ltd, the plaintiff and his co-director on the one hand and the 2nd defendant on the other hand due to default by the Rupa K Ltd to meet its obligations under the facility. The 2nd defendant sued the borrower and guarantors including the plaintiff in HCCC No. 53 of 2004, seeking recovery of the outstanding amount, being Kshs. 3,300,000/=. In that suit, the 2nd defendant sought judgment against the plaintiff and his co guarantor for Kshs. 450,000/= each.
3. The plaintiff averred that in a judgment delivered on 25th June 2014, the court allowed the 2nd defendant's suit and entered judgment for Kshs 2,533,675 with interest at 14% against Rupa (K) Ltd from the date of the judgment and Kshs 450,000/= each against the plaintiff and the other guarantor with interest at 16.5% from 30th September 2003. That judgment is the subject of an appeal before the Court of Appeal (***CA No. 330 of 2014 Rupa (K) Limited & 2 Others V Kenya Commercial Bank***), which was at the time of hearing this suit still pending.
4. The plaintiff stated that while the said appeal was pending, he learnt that the 2nd defendant herein had secretly and fraudulently and without complying with the law, sold his property to the 1st defendant in alleged exercise of its statutory power of sale.
5. The plaintiff pleaded that the 2nd defendant committed fraud and raised particulars of fraud in the plaint. According to the plaintiff, the 2nd defendant purported to exercise non-existent statutory power of sale; failed to conduct valuation of the property before sale; sold the property contrary to the principle of good faith while fully aware of the pendency of the appeal; acted with impunity and in contempt of the proceedings pending before the Court of Appeal.
6. He also pleaded that the 2nd defendant acted in contempt of the proceedings in HCCC NO. 53 of 2004 and the consequent judgment which awarded it (2nd defendant) Kshs. 2,533,675 with interest at 14% from the date of judgment.
7. The plaintiff averred that the 2nd defendant covertly instructed auctioneers to sell his property by public auction on the 27th March 2015 to recover outstanding loan of Kshs. 4, 885,913 as at that time which was said to be attracting interest at 23% per annum. The property was quietly sold to the 1st defendant in a public auction held on 11th June 2015 at Kshs. 6,750,000/=.
8. He contended that although the property was sold in June 2015, the certificate for sale was issued to the 1st defendant on 27th July 2017 and the transfer was registered on 8th January 2018. He faulted the 2nd defendant for selling the property through auction when it already had a decree in its favour.
9. The plaintiff sought the following reliefs:

(a) A declaration that the purported sale of title number Kajiado/Ntashart/258 to the 1st defendant during the pendency of Civil Appeal No. 330 of 2014 between Rupa (K) Limited & 2 Others V Kenya Commercial Bank Limited was illegal, null and void abinitio.

(b) A declaration that sale of title number/258 by the 2nd defendant to the 1st defendant was done through exercise of nonexistent statutory power of sale

(c) A declaration that the 2nd defendant's purported sale of title number Kajiado/Ntashart/258 to the 1st defendant is an illegality since judgment and decree was already entered in favour of the 2nd defendant in HCCC NO. 53 of 2004 against the plaintiff

(d) That the 1st defendant do retransfer the said title number Kajiado/Ntashart/258 within 14 days of the judgment to the plaintiff, failing which the Deputy Registrar of this court do execute transfer documents in favour of the plaintiff

(e) A permanent injunction do issue to restrain the 1st defendant from sub-dividing alienating, interfering with or otherwise howsoever dealing with the title number Kajiado/Ntashart/258

(f) General damages and exemplary damages for fraud and deceit

(g) General damages for the wrongful sale of title number Kajiado/Ntashart/258

(h) Costs

(i) Interest on (d), (f), (e) and (g) at court rates.

1st Defendant's defence

10. The 1st defendant filed its defence amended on 25th April 2019 and filed on 26th August 2019. The 1st defendant averred in response to paragraph 5 of the amended Plaintiff, that he is a stranger to the contents thereto. He also denied allegation in paragraphs 7-9 as well as the allegations contained in paragraph 10. He contended that he purchased the property at a public auction and therefore his acquisition of the property was lawful in compliance with the law and procedure. He also denied particulars of fraud at paragraph 10 of the amended Plaintiff.

11. In response to paragraphs 11-17 of the amended Plaintiff, the 1st defendant pleaded that he was not party to any court dispute between the plaintiff and the 2nd defendant and any issues arising from those suits can be determined in the suits pending in court.

12. Regarding paragraph 18 of the amended Plaintiff, the 1st defendant denied its contents and argued that he was a bona fide purchaser for value without notice. With regard to paragraphs 19 and 20 of the amended Plaintiff, the 1st defendant contended that he was a stranger thereto. He also denied contents of paragraph 21 of the amended Plaintiff and stated that he is the legal proprietor of the suit property. He prayed that the plaintiff's suit be dismissed with costs.

2nd Defendant's defence

13. The 2nd defendant filed its defence dated 23rd April 2019 on 24th April 2019. It averred that it was a stranger to the allegations in paragraph 4 of the amended Plaintiff; admitted that there was a previous suit, namely; HCCC No. 53 of 2004 and that the plaintiff raised a counter-claim in that suit on the sale of securities by public auction in exercise of its statutory power of sale and also sought a permanent injunction restraining the 2nd defendant from selling the property. The court, however, dismissed the counter-claim.

14. The 2nd defendant admitted that on being dissatisfied with the judgment of the court in HCCC No. 53 of 2004, the plaintiff appealed to the Court of Appeal and the appeal is still pending.

15. In response to paragraph 10 of the amended Plaintiff, the 2nd defendant averred that the plaintiff was duly served with the requisite notices, a fact that was acknowledged in the judgment in HCCC No. 53 of 2004; that the plaintiff was served with the 45 days' notice and notification of sale by the auctioneers.

16. The 2nd defendant also denied particulars of fraud. It stated that the property was valued prior to auction and that the sale was pursuant to existing statutory power of sale. In response to paragraphs 11, 12, 13 and 14 of the amended Plaintiff, the 2nd defendant reiterated that requisite notices were served; that the plaintiff was aware of the sale; that the memorandum of sale was signed on the date of the sale, 11th June 2015 and that the 2nd defendant exercised its statutory power of sale.

17. In response to paragraphs 15, 16 and 17, of the amended Plaintiff, the 2nd defendant averred that the question of indebtedness of the plaintiff to the 2nd defendant was determined in HCCC No. 53 of 2004; that it is true that Civil Appeal No. 330 of 2014 is still pending and that the property was sold in accordance with existing contract between the parties. It further averred that the notices issued were clear on the amount of debt due to the 2nd defendant which had not been paid.

18. The 2nd defendant further stated that the sale was conducted upon existing statutory power of sale once the plaintiff's counter-claim was

dismissed. It averred that the plaintiff is not entitled to damages or any other remedy and that it is a stranger to the allegations in paragraph 21 of the amended Plaintiff. The 2nd defendant contended that the suit is *res judicata* in view of the existence of Civil Appeal No. 330 of 2014. It prayed that the suit be dismissed with costs.

Evidence

19. The plaintiff testified relying on his amended witness statement dated 15th July 2019 and a bundle of documents dated the same day, that the 2nd defendant filed a suit in the High Court at Nairobi Commercial Division being HCCC NO. 53 of 2004, claiming Kshs. 3.2 million against Rupa (K) Ltd and 2 others, and that the 2nd defendant also sought judgment against him for Kshs. 450,000 as a guarantor to Rupa (K) Ltd and Kshs. 450,000/= from Cyrus Mbumwe Kamau also a guarantor.

20. The plaintiff testified that in a judgment delivered on 25th June, 2014, the court allowed the suit for Kshs. 2,535,675 against Rupa (K) Ltd. He was to pay Kshs. 450,000 and the same as his co guarantor. The plaintiff told the court that the 2nd defendant has never attempted to execute against him for the decretal sum of Kshs. 450,000 given in its favour. He also told the court that he was not served with a formal decree in that suit.

21. According to the plaintiff, the court also ordered that Kshs 450,000 earlier deposited in a joint interest earning account be released to the 2nd defendant but no prayer was sought or granted for sale of his land through statutory power of sale. He testified that the 2nd defendant sold his property fraudulently and prayed that the sale be cancelled and the land reverts to him.

22. In cross examination, the plaintiff admitted that Rupa (K) Ltd obtained an overdraft facility from the 2nd defendant of Kshs. 400,000 which was secured by legal charge over parcel Nos. Kajiado/Ntashart/258 and Kwale/Majoreni/1499. The two parcels were charged in favour of the 2nd defendant. He however denying knowledge that Rupa (K) Ltd defaulted in servicing the facility.

23. He also admitted that the 2nd defendant filed a suit in Nairobi against Rupa (K) Ltd, him and Cyrus Mbumwe and that the suit sought to recover the amount outstanding in the overdraft facility which had been converted into a loan. He stated however, that the overdraft facility expired on 31st December 1996; that the conversion of the overdraft facility into a loan was done on 19th September 1997 and that the 2nd defendant could not convert an expired overdraft facility into a loan.

24. The plaintiff also admitted that Rupa (K) Ltd, himself and Cyrus Mbumwe filed a defence and counter claim to the suit and that the issue of whether there was an overdraft facility or loan was determined in that suit; that one of the prayers in the counter claim was for injunction to stop the 2nd defendant from realizing the securities but the counter claim was dismissed and the court gave judgment in favour of the 2nd defendant. He stated that they appealed against that judgment. He admitted that if the appeal succeeds, their counter claim will be granted.

25. The plaintiff also admitted that the 2nd respondent had served him statutory notices before the suit in Nairobi was filed. He however denied that notification of sale was served on him. He told the court that he only saw a search from the lands office showing that the land was sold through a public auction and that the advertisement for sale was on 26th May 2015 after the judgment had been delivered in the Nairobi suit.

26. The plaintiff stated that he did not know that the sale was to take place and that he came to know about the sale between January, and February, 2018 and that was when he knew that the 1st defendant purchased the property in that public auction. He also stated that the sale was conducted on 11th June, 2015. He also stated that he did not know whether the 1st defendant had sold the property to another person. He maintained that he did not receive notices.

27. The 1st defendant testified also relying on his witness statement dated 2nd October 2018 and bundle of documents dated the same day produced PEX 1, PEX 2, PEX 3 and PEX 4. In his statement the 1st defendant maintained that he purchased the property in a public auction. He denied any fraud on his party.

28. He admitted in cross examination that he had started selling the property but he had not subdivided the land. He stated that he purchased the property at Kshs. 6,750,000/- from the 2nd defendant through public auction and that the 2nd defendant did not inform him that it had sued the plaintiff. He also stated that he was not aware that the 2nd defendant had obtained judgment against the plaintiff. He admitted that certificate of sale was dated 27th July 2017 while sale took place on 11th June 2015 as well as the memorandum of sale. He also admitted that the memorandum of sale showed that the sale was to be complete in 90 days. He told the court that although he paid the balance of the purchase price within the 90 days, the title Deed was issued later on 8th January 2018. He said the transfer delayed because he was out of the country.

29. DW2 Mary Musau, Assistant manager credit administration of the 2nd defendant based at Moi Avenue Branch, testified relying on her witness statement dated 4th July 2019 and a bundle of documents which were produced as exhibits namely; Pleadings in CA No. 330/2014 – DEX 5, Judgment in HCCC No. 53/2014 – DEX 6, Auctioneer's notices DEX 7 (a) and (b), Newspaper advertisement DEX 8, Valuation report dated 13/11/2014 DEX 9, Certificate of sale DEX 10.

30. In the statement the witness stated that they complied with the law and properly exercised the statutory power of sale. She denied that the 2nd respondent committed any fraud in selling the property through public auction.

31. In cross examination, the witness stated that Kshs. 4,885,913 was outstanding as at 27th March 2015 and that the property was sold pursuant to the 2nd defendant's instructions. She admitted that the letter of instructions did not refer to the judgment but the amount

recovered was that in their books.

32. She also stated that notices were issued and the plaintiff was with the notices by the auctioneer through registered post before the sale but she could not tell whether the plaintiff was personally served. She however maintained that they had instructed the auctioneer to also serve the plaintiff personally.

33. The witness stated that the judgment was given on 25th June, 2014 while the notice was issued on 27th March, 2015. She admitted that the 2nd defendant did not appeal against that judgment. She also admitted that the plaintiff's liability was to the extent of Kshs, 450,000 plus interest. She further stated that the judgment against Rupia (K) Ltd was for Kshs. 2535,675. She again admitted that the court had directed that Kshs, 450,000 was to be released to the 2nd defendant through its Advocates. The witness stated that the 2nd defendant issued instructions to the auctioneer on 27th March, 2015 to sell the property by public auction.

Plaintiff's submissions

34. The plaintiff filed his submissions dated 10th March 2020 on 11th March 2020. He identified 4 issues for determination, namely; whether the suit is *res judicata*; whether the 2nd defendant was right in selling the his property in exercise of statutory power of sale; whether the 2nd defendant enforced the decree in HCCC 53 of 2014; whether the 1st defendant is a bona fide purchaser for value without notice and whether he is entitled to the reliefs sought.

35. On the first issue whether the suit is *res judicata*, the plaintiff submitted that it was not. He relied on ***Black's Law Dictionary*** 9th Edition on the definition of *res judicata*.

36. According to the plaintiff, the 2nd defendant admitted through its witness that it had been unable to sell the property in 2003 and therefore opted to file the suit to recover the money which was determined in HCCC 53 of 2004 and the court gave judgment in favour of the 2nd defendant.

37. He argued that the cause of action in HCCC No. 53of 2004 was different from the present suit. In his view, the present suit seeks to determine a different issue from that which was in HCCC No. 53 of 2004.

38. Regarding the second issue, statutory power of sale, the plaintiff submitted that section 90(3) of the Land Act, grants a chargee 5 different statutory remedies where a chargor has defaulted in repaying the money advanced. These are; a suit to recover the outstanding loan; appoint a receiver of income of the charged land; lease the charged property; enter into possession of the charged land or sell the charged land.

39. The plaintiff submitted that the 2nd defendant admitted that it had been unable to sell the property and therefore it opted to sue for recovery of the amount in HCCC No. 53 of 2004 culminating in a judgment and decree issued in favour of the 2nd defendant.

40. According to the plaintiff, the law does not contemplate a situation where the lender can combine the remedies available to it. He relied on ***Mulla on the Code of Civil Procedure*** 16th Edition page 212, for the argument that if a mortgagee in a suit for redemption against him by the mortgagor opts to obtain an order for sale of the mortgaged property on failure of payment, he will be excluded from bringing a separate suit for sale in default of payment of the mortgaged property.

41. The plaintiff argued that the 2nd defendant did not seek leave of the court to sell the property and that section 97(1) requires the chargee to seek leave of court to sell the property which is separate from the chargee's statutory power of sale.

42. The plaintiff relied on ***Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank (Kenya) limited*** [2017] eKLR, for the submission that a chargee cannot sue the principal debtor and at the same time exercise the statutory power of sale. He argued that the 2nd defendant had to choose one remedy and since it obtained a money decree, it could only execute that decree.

43. On whether the 2nd defendant enforced the decree in HCCC No. 53 of 2004, the plaintiff argued in the negative. According to the plaintiff, DW2 admitted in her testimony that the 2nd defendant gave instructions for the sale of the charged property. He argued that the 2nd defendant's act of selling his property was fraudulent.

44. On whether the 1st defendant is a bona fide purchaser for value without notice, the plaintiff relied on the definition in ***Black's Law Dictionary*** 9th edition as one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title.

45. The plaintiff relied on ***Athi Highway Developers Limited v West End Butchery Limited & 6 Others*** [2015] eKLR on the definition of purchaser for value without notice. He argued that the 1st defendant did not prove the ingredients that constitute the definition, namely; that he holds a certificate of title; that he purchased the property in good faith; he had no knowledge of the fraud; that the vendor lacked apparent valid title; he purchased without knowledge of any fraud and that he was not party to the fraud. He argued that the 1st defendant was aware of the suit.

46. He relied on ***Mawji v US International University & Another*** [1976] KLR 185 on the importance of the doctrine of purchaser without notice.

47. The plaintiff argued that the 1st defendant had no right to enter into any sale agreement for the suit property, and that fraud vitiated

everything. He relied on *Lazarus Estates Limited V Beasley* [1956] 1 All ER 341 for the argument that one should not benefit from his own fraud. He contended that where fraud has been proved, any other consequential arrangements between parties become null and void ab initio.

48. He further submitted relying on *Athi Highway Developers Limited Case that* protection accorded to a bona fide purchaser without notice is subject to qualification only against equitable interests. He urged the court to award general damages and relied on *Alton Homes Limited and Another v Davis Nathan Chelogoi & 2 Others* [2018] eKLR where the court awarded general damages of Kshs. 5,000,000/=.

1st Defendant's submissions

49. The 1st defendant filed written submissions dated 6th July 2020 and filed on 10th July 2020. The 1st defendant identified three (3) issues for determination namely; whether sale of the property was fraudulent; whether he was an innocent purchaser for value without notice and whether the suit is *res judicata*.

50. On the first issue, he argued that allegations of fraud must be pleaded and proved. He relied on *Nancy Kahoya Amadiva v Export Credit Limited & Another* [2015] eKLR where the Court of Appeal held that it is not enough to infer fraud from facts. Fraud must be specifically pleaded and particulars thereof stated on the facts of the pleadings. He also relied on *Vijay Morjaria v Nansingh v Madhusingh Darbar & Another* [2000] eKLR.

51. He argued that in the present case, the plaintiff did not specifically plead any allegations of fraud against him and that the particulars pleaded in the amended Plaint are ambiguous. He further argued that there is no evidence that the plaintiff reported fraud to the police.

52. On whether he is a bona fide purchaser for value without notice, the 1st defendant submitted that he purchased the property in a public auction conducted by auctioneers instructed by the 2nd defendant. He argued that the auction was advertised on 26th May 2015; that he emerged the highest bidder and was issued with a memorandum of sale. A transfer was later registered and he was issued with a title deed on 8th January 2018.

53. The 1st defendant argued that he was not aware of any dispute between the plaintiff and the 2nd defendant over the suit property and that the plaintiff did not adduce evidence to the contrary. He also argued that in HCCC No. 53 of 2004, the plaintiff admitted to have been served with mandatory statutory notices and that his counter-claim was dismissed in that suit. He relied on *Nancy Kahoya Case* citing *Captain Patrick Kanyagia & Another v Damaris Wangeci & Others* [1995] eKLR for the submission that there is no duty cast on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell.

54. The 1st defendant argued that he had sold the property to another person and he was no longer the proprietor. He argued that although this was disclosed in evidence during the hearing, the plaintiff did not join the new owner of the property to the suit.

55. Regarding whether the suit is *res judicata*, he argued that parties litigated in HCCC No. 53 of 2004 which was over the property charged as security. After the judgment, an appeal was lodged in the Court of Appeal. It was the 1st defendant's case that the matter is *sub judice* as the appeal is pending. He relied on section 6 of the Civil Procedure Rules. He also relied on *Thiba Min Hydro Company Limited v Josphat Karu Ndwiga* [2013] eKLR to support his argument.

56. The 1st defendant argued that since an appeal is pending before the Court of Appeal seeking to set aside the judgment in HCCC No. 53 of 2004 and allow the counter-claim, the plaintiff is in violation of the rule. He also argued that in the event the appeal succeeds, the judgment in HCCC 53 of 2004 will be set aside.

57. According to the 1st defendant since the plaintiff is aggrieved in the manner execution was conducted, he could deal with the issue under section 34 of the Civil Procedure Act. He urged that the suit be dismissed.

2nd Defendant's submissions

58. The 2nd defendant filed submissions dated 4th June 2020 and filed on 5th October 2020. It identified several issues for determination, namely; whether the 2nd defendant had statutory power of sale; whether the sale offended the doctrine of *lis pendens*; whether the 2nd defendant recovered the amount determined by the court; whether the sale was fraudulent and invalid; whether the 1st defendant is a bonafide purchaser for value and whether the suit is an abuse of the court process.

59. On the first issue, the 2nd defendant submitted that it had at all times the statutory power of sale to recover the outstanding amount. It contended that the plaintiff had not produced a court order stopping it from selling the property in exercise of its statutory power of sale. According to the 2nd defendant, its statutory power of sale is granted by statute. It maintained that the plaintiff's counterclaim in HCCC No. 53 of 2004 for injunction was dismissed paving the way for it to exercise its statutory power of sale.

60. The 2nd respondent relied on the saving provision of section 162(1) of the Land Act. It also relied on *Barclays Bank of Kenya Ltd v Attorney General & another* [2015] eKLR for the argument that if appropriate notices had been given under the repealed laws, the chargee would not be obliged to serve fresh notices.

61. On whether the sale of the property infringed the doctrine of *lis pendens*, that is; a pending other legal action, the 2nd defendant submitted that the pending appeal did not affect exercise of its statutory power of sale. It reiterated that there was no order stopping it from selling the property in exercise of this power. It relied on *Anthony Muthumbi Wachira & Another v Housing Finance Company of Kenya* [2015] eKLR for the submission that *lis pendens* relates to acts that are done during pendency of a suit and that pendency of a suit

commences from the time the suit is filed.

62. It also relied on *Al-Jalal Enterprises Limited v Gulf African Bank Limited* [2014] eKLR for the argument that *lis pendens* does not apply to charges and mortgages. In *Equip Agencies Limited v I & M Bank Limited* [2017] eKLR, the Court of Appeal stated that the doctrine of *lis pendens* being an equitable remedy, cannot affect statutory rights exercised under the Land Act on a charge created under the Act.

63. On whether the 2nd defendant recovered the amount determined by the court in HCCC 53 of 2004, the 2nd defendant submitted that it exercised its statutory power of sale and that its witness had testified that the amount recovered was computed from what was awarded by the court in that suit.

64. Regarding the issue whether the sale was fraudulent, it was the 2nd defendant's submission that the sale was valid and was done transparently after requisite notices were issued and served. It argued that sale of the property was advertised and the plaintiff never made any attempt to stop the sale.

65. Whether the 1st defendant is a purchaser for value without notice, the 2nd defendant argued in the affirmative, that it exercised its statutory power of sale after due process and sold the property in a public auction with the plaintiff's knowledge.

66. And on whether the suit is an abuse of the court process, the 2nd defendant again argued in the affirmative. It contended that the issue in HCCC No. 53 of 2004 and in the appeal before the Court of Appeal is the same as that in the present suit. In its view, the present suit is an abuse of the court process. It urged the court to dismiss the suit with costs.

Determination

67. I have considered this suit; the defences, evidence submissions and authorities relied on. In my view, four issues arise for determination, namely; whether the suit is *res judicata*; whether the 2nd defendant could exercise its statutory power of sale and whether the 1st defendant is a purchaser for value without notice. And depending on the answers to the above issues, what relief, if any, to grant. Before dealing with the above issues, a review of the undisputed facts of this suit is necessary.

68. The plaintiff is a director of Rupa (K) Limited. Rupa (K) Limited obtained a financial facility from the 2nd defendant guaranteed by the plaintiff and another director. The plaintiff charged his property parcel No. Kajado/ Ntashart/258. Rupa (K) Limited defaulted in meeting its obligation towards servicing of the financial facility. This forced the 2nd defendant to file HCCC No. 53 of 2004 to recover the amount due. Rupa (K) Limited, the plaintiff and the other director, filed a defence and counter-claim to the suit seeking among other reliefs, an injunction against selling of the charged properties.

69. The court allowed the 2nd defendant's suit and entered judgment in its favour for Kshs. 2,535,675 with interest at 14% from the date of the judgment. Judgment was also entered against the plaintiff and his co-director for Kshs. 450,000/- each with interest at 16.5% from 30th September 2003. The counter-claim was dismissed. Rupa (K) Limited, the plaintiff and his co-director were dissatisfied with that decision and lodged an appeal to the Court of Appeal which is still pending. After the judgment, the 2nd defendant advertised the plaintiff's property and sold it to the 1st defendant in a public auction in exercise of its statutory power of sale, prompting this suit.

Whether the suit is res judicata

70. The 1st defendant has argued based on the undisputed facts above, that this suit is *res judicata*. However his submissions and authorities are on *sub judice* which is under section 6 of Civil Procedure Act and therefore a different principle from the doctrine of *res judicata* under section 7 of Civil Procedure Act.

71. *Res judicata* is a principal of law that prohibits courts from dealing with a matter that has previously been conclusively dealt with by another court of competent jurisdiction. Section 7 of the Civil Procedure Act, therefore, bars subsequent proceedings that are similar to those in former suits, between same parties or substantially same parties and over similar or nearly similar issues which have been heard and conclusively determined by a court of competent jurisdiction to hear such matters.

72. Section 7 provides;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

73. For a suit to be *res judicata*, the subsequent suit must raise similar or substantially similar issues to those in the former suit. The new suit must be between the same parties or parties acting on behalf of those in previous suit, and the new suit must be over the same subject matter. The issues in the new suit must have been conclusively determined by a court of competent jurisdiction.

74. There are many authorities on this point but it suffices to refer to *John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015]eKLR where the Court of Appeal stated:

“Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively

decided by a competent court in a prior suit between the same parties or their representatives.”

75. The Court went on to state:

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence...On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice.”

76. As seen from both statute and authority, the doctrine requires that for the present suit to be *res judicata*, it must be similar to the previous suit; must be between same parties or parties acting on behalf of those in the former suit and the issue in the present suit must have been conclusively determined in the previous suit by a court of competent jurisdiction.

77. There is no denial that some parties to the present suit were parties to the previous suit. That is the plaintiff and the 2nd defendant. There is also no doubt that some of the issues in the former suit could somehow appear to be similar to the issues in the present suit. However, looking at the facts of this suit, I do not agree with the defendants that the present suit is *res judicata*.

78. In the previous suit the 2nd defendant sued for recovery of the outstanding loan amount from Rupa (K) and the plaintiff herein. Rupa (K) Ltd filed a counter-claim for injunction. The 2nd defendant’s suit was allowed but the counter-claim was dismissed. The claims in the former suit and those in the present suit are clearly different. In the present suit the principle issue is whether the 2nd defendant had the right to sell the property. For that reason I do not agree that this matter is *res judicata*. This argument falls.

Whether the 2nd defendant could exercise its statutory power of sale

79. The plaintiff has argued that the 2nd defendant sold the property by purporting to exercise a non-existent statutory power of sale. According to him, the 2nd defendant having sued for the outstanding loan amount and obtained a decree, it could only execute the decree but not sell the property through public auction. In his view, the 2nd defendant had an election to make which remedy to pursue.

80. The defendants disagreed with the plaintiff’s submission that the 2nd defendant could not exercise its power of sale. They contended that the 2nd respondent properly exercised its statutory power of sale; a remedy availed to it by statute.

81. I have considered respective parties arguments on this issue. I have also considered the evidence on record and perused the judgment in HCCC NO. 53 of 2004. The fact of the matter is that the plaintiff charged his property to guarantee the financial facility extended to the Rupa (K) Limited by the 2nd defendant. There was, however, default by Rupa (K) Ltd.

82. To determine this issue, one has to look at the law. The law allows a chargee to exercise its statutory power of sale in the event of default by the borrower to repay the loan or financial facility.

83. Section 90(1) of the Land Act, provided that if a chargor is in default of any obligation, that is; fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, requiring him to pay the money owing or to perform and observe the agreement as the case may be.

84. Under subsection (2) the notice to be served should adequately inform the chargor the nature and extent of the default; the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed and consequences if he fails to comply.

85. Subsection (3) provides for the options available to the chargee if the chargor does not comply within the period given. The chargee may (a) sue the chargor for any money due and owing under the charge; (b) appoint a receiver of the income of the charged land; (c) lease the charged land, or if the charge is of a lease, sublease the land; (d) enter into possession of the charged land; or (e) sell the charged land. Subsection 4 provides for other remedies available to the chargee where the charge is over land held under customary rights or is community land.

86. A proper reading of section 90(3), therefore, shows that the 2nd defendant, as chargee, was required to make an election on which of the remedies to go for. The subsection uses the word ***or*** which means the remedies are disjunctive and not conjunctive, distinct and not cumulative. The 2nd defendant could only choose one remedy and not more.

87. In this regard, the 2nd defendant having elected to sue for the outstanding loan amount and having obtained a judgment and decree in its favour, it lost its right to exercise the statutory power of sale. The 2nd defendant could not purport to exercise a right that was extinguished the moment it elected to sue for the outstanding amount.

88. The 2nd respondent tried to argue in its submissions that the amount recovered was that awarded in the judgment. However, throughout its evidence and submissions, the 2nd defendant did not argue that it was executing the decree when it sold the plaintiff's property. There was no evidence that it extracted the decree and obtained warrants of attachment and sale from the court that issued the decree for purposes of execution. Further, the 2nd defendant did not show that when it instructed the auctioneer to sell the property, it was executing the decree issued in its favour through valid warrants of attachment and sale in accordance with the auctioneers Act and rules.

89. There is also no doubt that the 2nd defendant sued the plaintiff in HCCC No. 53 of 2004 and obtained judgment against him for Kshs. 450,000 together with interest. That meant the 2nd defendant could only execute against the plaintiff for the amount in the decree and interest as ordered by the court in that suit. The action of suing both the principal borrower and the plaintiff as the guarantor discharged the plaintiff from his obligations under the charge. He became a debtor under the decree and the 2nd defendant could only execute against him in terms of the decree. It could not sell his charged property purporting to exercise the statutory power of sale that it lost the moment it elected to sue for the amount.

90. The 2nd defendant did not address itself to section 90(3) of the Land Act at all but maintained that its statutory power of sale was intact even after electing to sue for the outstanding loan amount. The view this court takes is that the 2nd defendant was aware of the law but was skating around the issue.

91. In that regard, I agree with the court's observation in *Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank (Kenya) Limited* (supra), that:

“[49]. Among the remedies of the chargee against a “defaulting chargor” is the power of sale. It targets the charged property and not the chargor on his personal covenants. Therefore the chargee cannot sue the Principal Debtor and at the same time “exercise power of sale” [over]the Guarantor’s charged property. But cannot sue the Guarantor personally and at the same time sell the charged property.”

92. The 2nd defendant had no residual remedy available once it elected to sue. Any other action taken in the form of selling the property in exercise of statutory power of sale was not permissible in law. The verdict I return in respect to this issue is that the 2nd defendant could not exercise the right of statutory power of sale since it had been distinguished following its election to sue for the loan amount.

Whether the 1st defendant is a purchaser for value without notice

93. The next issue is whether the 1st defendant is a purchaser for value without notice. The plaintiff argued to the contrary while the defendants argued that he was. According to the defendants, the property was advertised in the newspapers; the 1st defendant attended and participated in the auction and was declared the highest bidder. He paid the deposit and later the balance. He was given all the documents including the memorandum of sale. The property was later transferred into his name and a title deed issued to him.

94. I have considered the arguments by both sides. There is no doubt that the property was advertised for sale by public auction. This was done through newspapers. The 1st defendant attended and participated in the auction and was declared the highest bidder. There is no denial that he paid the deposit and later the balance and the property was transferred into his name.

95. In *Katende v Haridar & Company Limited [2008] 2 E.A.173*, the court of appeal of Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.”

96. The court went on to state that for a purchaser to successfully rely on the *bona fide* doctrine, he must prove that he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud and that he was not party to any fraud.

97. At the time the property was advertised, the 1st defendant could not know that there was a dispute between Rupa (K) Ltd and the plaintiff on the one hand and the 2nd defendant on the other. Even during the auction, there was no way the 1st defendant would know of existence of such a dispute. The 1st defendant attended and participated in the auction just like any other bidder. He was under no obligation to inquire on the conditions of the title and whether there were any outstanding disputes between the parties.

98. Doing so, would be asking too much from a bidder who would have no way of ascertaining such details. Once the property is advertised for sale by public auction, interested bidders are informed what to ascertain and what is not warranted. In that regard, therefore, I am persuaded that the 1st defendant was a purchaser for value without notice.

99. In arriving at this conclusion, I am guided by the decision in *Captain Patrick Kanyagia & Another V Damaris Wangeci & Others* (supra). The court, (*Shah, JA*) observed that the first appellant who had attended the auction sale was declared the highest bidder. He paid 25% of the bid price as was stipulated by one of the conditions of sale. He signed the contract of sale. He was to pay the balance of the purchase (bid) price within 60 days which he did. He and his wife were therefore purchasers in good faith without notice of any right or title, if any. The Judge then stated:

“I see no duty cast, in law on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell.... The buyer's duty is to check the register and see if the title of the vendor or the mortgagee exercising its/his

power of sale is clear.”

100. See also *Athi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR

101. The 1st defendant has a title deed in his name. He participated in a public auction where he was declared the highest bidder. Although the plaintiff tried to argue that he did not pay the balance of the price as required, the 1st defendant showed that the money was paid to the 2nd defendant. Even if it had not been paid as required, the 2nd defendant tolerated it and the money was eventually paid. It was on that basis that a title was issued to the 1st defendant. Moreover, there is no evidence that the 1st defendant was party to any alleged fraud. I therefore find and hold in the affirmative, that the 1st defendant is a purchaser for value without notice.

Reliefs to grant

102. Having come to the conclusions I have on the three issues, the final issue is what reliefs to grant. The plaintiff sought several reliefs. He urged the court to declare that sale of the suit land during the pendency of an appeal before the Court of appeal was illegal null and void. This court cannot attempt to deal with an issue that can only be dealt with by the Court of Appeal.

103. There were submissions that the plaintiff and his co appellants had filed applications before the Court of Appeal for contempt. The issue of sale of the land during the pendency of an appeal before the Court of Appeal is not an issue for this court to deal with. I say no more.

104. The plaintiff also urged the court to declare that the sale of his land by the 2nd defendant by exercise of statutory power of sale was done pursuant to non-existent remedy. I have already held that the 2nd defendant having elected to sue for the outstanding loan, lost its right to exercise the statutory power of sale.

105. The plaintiff further prayed that the court declares sale of the land to the 1st defendant by the 2nd defendant by exercising non-existent power, is an illegality. He also asked that the 1st respondent be ordered to retransfer the land back into his name, and a permanent injunction restraining the 1st defendant from selling and or in any other manner dealing with the suit land.

106. It is true that the 2nd defendant could not exercise its statutory power of sale. That being the case, it could not have sold the land to the 1st defendant. However, as the court has already held, the sale was done through a public auction that had been duly advertised. The 1st defendant was declared the highest bidder and paid for the land. He obtained a title in his name and was not aware of any defects in the title or the process. He became a purchaser for value without notice.

107. Furthermore, during the hearing, the 1st defendant said that the land had been sold. None of the parties attached the current search from the lands office to show the current status regarding ownership of the land. If the land has already been sold that introduces a third party into the picture. This court cannot make orders that will have a significant effect on the rights of a third party without hearing him. That being the case, it is not legally justifiable to make the orders the plaintiff seeks thus infringing on the rights of a third party without giving him/her an opportunity to be heard.

108. In the circumstances, the remedy that commends itself to me to make is damage. The 2nd defendant could not sell the land in the manner it did. At the same time, the plaintiff admitted that he had not paid the decretal amount of Kshs. 450,000/= with interest at 16.5% from 30th September 2003 as decreed by the court in HCCC No. 53 of 2004. That amount continues to attract interest. As it is the plaintiff is still the 2nd defendant's debtor. That issue will however be resolved by the Court of Appeal.

109. The plaintiff pleaded that the land is approximately 100 acres. The defendants did not say anything on this. I have perused a copy of title No. Kajiado/ Ntashart/ /258 produced as an exhibit by the 1st defendant. The land is in the 1st defendant's name and is 16.0 HA far less than 100 acres as the plaintiff claimed. I must also point out that the court is not compensating the plaintiff for the value of his land, but for the inconvenience and loss he suffered through exercise of non-existent right by the 2nd defendant.

110. Taking all this into account, I am of the considered view that general damages of Kshs. 3,000,000/= will be appropriate compensation in the circumstances of this case.

111. In the end, the plaintiff's suit partially succeeds and I make the following orders.

a) A declaration is hereby issued that sale of title number Kajiado /Ntashart/258 by the 2nd defendant to the 1st defendant was done through exercise of non-existent statutory power of sale since the 2nd defendant already had judgment and decree in its favour in HCCC NO. 53 of 2004

b) The plaintiff is hereby awarded general damages of Kshs. 3,000,000/= for wrongful sale of title number Kajiado/Ntashart/258

c) The plaintiff shall also have interest at court rates from the date of judgment

d) Costs to the plaintiff

Dated, Signed and Delivered at Kajiado this 9th day of October, 2020.

E. C. MWITA

JUDGE