



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 726 OF 2013

FRANCIS WAINAINA KARIUKI.....PLAINTIFF

VERSUS

SAMUEL KIONGO NDEGWA.....DEFENDANT

AND

NATIONAL BANK OF KENYA LTD.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

The plaintiff in a plaint dated 7th January 2005 sought the following orders:

- (a) Eviction order.***
- (b) Costs of this suit.***
- (c) Interest on (b) above.***
- (d) Any other relief this Honourable Court may deem fit.***

In the said plaint, the plaintiff averred that he bought the suit land parcel No. MWERUA/KANYOKORA/420 through a public auction on 14th January 2003. He further averred that he duly paid the full purchase price and was registered as the absolute proprietor of the land. The plaintiff also averred that he took possession of the land but the defendant requested him to allow him to vacate after six (6) months which request he acceded to but the defendant declined to vacate after six months necessitating the instant suit. The defendant filed a written statement of defence dated 31st January 2005 in which he alleged that the sale by public auction was fraudulent and that the same was null and void.

PLAINTIFF'S CASE

The plaintiff Francis Wainaina Kariuki testified and stated that he filed the plaint herein dated 7th January 2005 and a list of documents dated 9th September 2013. The plaintiff also stated that he filed another list of documents dated 17th February 2016. He produced them as Plaintiff's Exhibits No. 1 – 4 respectively. Plaintiff Exhibits No. 1 & 2 are a title deed and a copy of search certificate. He sought to have his claim allowed with costs.

On cross-examination, the plaintiff stated that he knew the defendant well. He said that the defendant is a cousin to his wife. He stated that he bought the suit land through a public auction on 14th January 2003. He stated that the land was advertised around November 2002. He said that there were advertisements all over. He said that before the auction, he did not attempt to buy the land. He stated that he did not know whether the bank had given the defendant notices. He said that he paid Ksh. 760,000/=. He paid 25% which was 190,000. He said that when he bid for the land, he paid 25% and the balance was paid within 30 days. He said that he paid to the bank that is National Bank of Kenya who acknowledged all the payments. He stated that the defendant occupies the land. In 2003, the defendant requested 6 months and he allowed him to stay then he refused to move out. He said he did not go to the bank to negotiate the land with the defendant. He said he did not transfer his money to Barclays Bank. He said he was not attempting to buy the land for 1.7 million. He also stated that he has no grudge with Kiongo, the defendant herein. He said that he also owns some land there. He stated that he cannot accept a refund. He said that Civil Suit No. 505/2003 in Nyeri CM's Court was filed by the defendant and it was thrown out. He said the suit was struck out as an abuse of the process of the Court.

The plaintiff called David Kimani John (PW2) who also testified on oath and stated that he recorded his statement on 28th May 2016. He stated that he was aware the defendant had a loan with National Bank which he was not servicing and after some time, the bank auctioned the land and the plaintiff bought at an auction. He stated that the plaintiff participated in the auction and was declared the successful bidder. Subsequently, he was given possession and he started using the land. He said that the defendant pleaded with the plaintiff at family levels to be given a grace period of six (6) months to vacate. Thereafter, he refused to give possession and became extremely violent. He stated that the defendant now uses the entire land without regard to the owner. On cross-examination, the witness confirmed that he know the suit land very well being MWERUA/KANYOKORA 420. He stated that the defendant lives there. He stated that the defendant's land was auctioned and the plaintiff bought it. He said that at the first place, he agreed to let the defendant stay for 6 months and then he moves out.

DEFENDANT'S CASE

The defendant testified and stated that the plaintiff is his brother-in-law. He stated that the land he lives on belongs to him. He said that there was an auction on 14th April 2003 but he was not served. He said he was there with his wife and sister. He saw the Auctioneer, Bank Manager and another bank representative. He said that the auctioneer rang the bell. He also saw the plaintiff. He said nobody bid and they later left. He admitted he had a bank debt of Ksh. 4,000/= which accumulated to Ksh. 856,000/= which was the amount outstanding. He stated that he had gone to the plaintiff's wife and told them he needed a person to buy the land and she told her husband who brought someone from Embu who did not pay. He said that he later requested that he would purchase the land himself. He stated that they went to Karatina where they talked with the Manager to reduce the balance and the Manager reduced it to Ksh. 700,000/=. He said that they came to Kerugoya and got a letter from Barclays Bank to take to Karatina to enable the plaintiff to take over the loan. He said that he later refused to purchase the land. He said that he got him on the auction. He said that he only saw one notice to sell the land within 3 months. He did not see a letter from the Auctioneer. The notice received was shown to Court. He said there are 1,400 coffee stems, macadamia, 60 stems, trees and a semi-permanent house etc. He said that from 2003 to 2018, he had not stood in Court. This is his first statement. He produced the notice as Defence Exhibit No. 2.

On being cross-examined by Mr. Magee, the defendant said that the plaintiff is married to his cousin. He said that he is a brother-in-law. He said that the land is registered in his name. He said he has not gone to the Lands office. He said that when the auction was done, he heard Ksh. 856,000/=. He had not paid. He said the bank had given him a notice. He said the notice in Court shows he had arrears since 1997. He said that he attended the auction since his land was being sold. He said if he had money, his land could not be sold. He said the case he filed in Nyeri CM's Court was dismissed and the appeal thereof was dismissed. He said that after the Engineer bought the land, he never requested to stay for six months. No one bought his land. He said he had no documents to produce for the registration with the plaintiff.

ANALYSIS AND DETERMINATION

I have considered the testimony by the plaintiff and his witnesses and that of the defendant. I have also considered the documents contained in the list of documents identified and produced by the parties. The one single issue for determination in the dispute between the parties is whether the plaintiff has proved his case against the defendant on a balance of probabilities. The plaintiff's claim against the defendant is an eviction from the suit land parcel No. MWERUA/KANYOKORA/420. He testified that he bought the suit land through a public auction. He produced a copy of certificate of title and certificate of official search indicating that the suit land parcel No. MWERUA/KANYOKORA/420 is registered in his names. The plaintiff also produced an agreement dated 11th January 2003 between him and Watts Auctioneers who conducted the public auction of the suit property upon instructions by National Bank of Kenya Limited who were exercising their statutory power of sale. The said agreement is witnessed by one Onesmus W. Macharia. The plaintiff also produced a letter by National Bank of Kenya Limited addressed to the Managing Director, Watts Enterprises Ltd dated 28th January 2003 informing them that the plaintiff herein who was the purchaser of the auctioned property had paid the 25% of the sale price and was making arrangements to pay the balance within 30 days from the date of auction. Another documents produced by the plaintiff is a letter by Watts Enterprises Auctioneers addressed to the plaintiff dated 24th February 2003 notifying him he was the highest and successful bidder during the public auction in respect of the suit property held on 14th January 2003 at a price of Ksh. 760,000 and also acknowledged receipt of his payment of Ksh. 190,000/= being the mandatory 25% deposit of the purchase price which he paid after the fall of the hammer. The plaintiff also produced another letter written by Watts Enterprises Auctioneers dated 24th February 2003 confirming that the plaintiff had indeed attended the auction of the suit land on 14th January 2003 and emerged the highest bidder. The other document produced is listed as Item No. 5 in the plaintiff's list of documents which is another letter by Watts Auctioneers addressed to the defendant herein informing him that they had conducted the public auction on 14th February 2003 and sold the suit property to Francis Wainaina Kartuki who is the plaintiff herein. The 6th Item in the plaintiff's list is a plaint in a suit filed by the defendant in Nyeri Magistrate's Court No. 505 of 2003. The next item is a Memorandum of Appeal by the defendant No. 14 of 2005 (Nyeri). Item No. 8 is a title deed of L.R. MWERUA/KANYOKORA/420 registered in favour of the plaintiff and issued on 11th December 2003. Item No. 9 is an Order issued on 12th December 2004 in respect of CMCC No. 505 of 2003 (Nyeri) where the said case was struck out with costs. Items no. 10 and 11 are proceedings in respect of the order issued on 12th November 2004. Item No. 12 is a judgment in Civil Appeal No. 14 of 2005 between the defendant and the plaintiff in this case. These documents were all produced in evidence. The import of the documents produced by the plaintiff is that the defendant in this case had sought to challenge the title and Auctioneer who sold the plaintiff the suit land during the auction on 14th January 2003. The defendant's suit was struck out. He appealed against the order striking out the suit but the Appellate Court dismissed the Appeal for being filed out of time. The defendant in his defence made allegations of fraud committed by the plaintiff but did not prove the same or at all. The defendant did not even seek leave to enjoin the Auctioneers who conducted the public auction on behalf of National Bank of Kenya Limited. The defendant did not also file a counter-claim to the suit land or the cancellation of the title deed issued to the plaintiff herein. The defendant in his testimony actually admitted he was in arrears of a loan which had been secured by the title to the suit land. He also admitted he had been issued with a statutory notice of intention by his bank to auction his land. The defendant also admitted that there was an auction which was held and that he attended and also saw the auctioneer, the bank officials and the plaintiff herein. He further admitted that he is living in the suit land. The defendant's admission of a public auction and the attendance of the auctioneer, the plaintiff and the bank officials flies on the face of his own defence that no auction ever took place. The plaint produced by the plaintiff in CMCC No. 505/2003 (Nyeri), the proceedings and an order striking out the same is a clear indication that the defendant had filed another suit in respect of the suit property. The High Court Civil Appeal Case No. 14 of 2005 (Nyeri) and the judgment by Hon. Lady Justice Mary Kasango on 16th October 2008 is a further testimony that there is no pending suit between the plaintiff and the defendant in respect of the suit land.

From the evidence adduced by the plaintiff, I am satisfied that National Bank of Kenya Limited in exercise of their statutory power of sale duly instructed Watts Enterprises Auctioneers who duly conducted a public auction of the suit property on 14th January 2003 where the plaintiff, Francis Wainaina Kariuki was declared the highest bidder. The plaintiff was subsequently registered as proprietor of the suit land pursuant to the said auction and the defendant has not sought by way of a counter-claim to have the title cancelled and the register rectified. The only remedy available to the defendant if indeed he was aggrieved by the exercise of the statutory power of sale by National Bank of Kenya Limited is to sue for damages. In the case of **GABRIEL NDUNGU GITHUA VS NATIONAL BANK OF KENYA & 2 OTHERS (2009) e K.L.R, JUSTICE KIMARU** held as follows:

“The only remedy available to the plaintiff, if he was aggrieved by the said exercise of the statutory power of sale, is to sue for damages. As regards whether the plaintiff’s equity of redemption is still in existence, I need not look further than to cite with approval the decision of Nyamu J. (as he then was) in Nairobi HCCC No. 9 of 2003 Ze Yu Yang Vs Vova Industrial Products Ltd (unreported) where at page 9 of his ruling, he held as follows:

“Turning to the issue of the equity of redemption where there is a valid contract of sale in existence, there is a galaxy of cases starting with celebrated case of GEORGE MBUTHIA & JUMBA CREDIT CORPORATION CIVIL APPEAL 111 OF 1986. In that case, the decision of Chief Justice Apaloo at page 5 clearly states that the equity of redemption is extinguished by a valid contract under Section 60 of the Transfer of Property Act”

I concur with the decision by the learned Judge that once a contract executed by parties pursuant to a public auction conducted in exercise of a statutory power of sale, the equity of redemption stands extinguished. The other issue of concern in this case is that the plaintiff is the registered owner of the suit property L.R No. MWERUA/KANYOKORA/420. **Section 26 (1) of the Land Registration Act No. 3 of 2012** provides as follows:

“26 (1) The certificate of title issued by the Registrar upon Registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, un-procedurally or through corrupt scheme”.

Other than pleading particulars of fraud in his defence, the defendant did not prove the same or even make a counter-claim to the plaintiff’s claim. I have said enough and do make the following orders in conclusion:-

(1) The defendant be and is hereby given 30 days from today to vacate the suit land parcel No. MWERUA/KANYOKORA/420 failing which he shall be evicted.

(2) The Officer Commanding Kerugoya Police Station to supervise the exercise and ensure law and order is observed.

(3) The defendant shall pay the costs of this suit plus interest at Court rates.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Asimwe holding brief for Mr. Magee for Plaintiff

2. Mr. Kinyua holding brief for Mr. Mugo for Defendant

3. Mbogo – Court clerk.