



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL SUIT NO.115 OF 2015

**DANIEL KIPKURUI KOSGEI (SUING AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF MOSES KIPKOSGEI TESOT- DECEASEDPLAINTIFF**

VERSUS

JOHN KIPLANGAT KIRUI.....1ST DEFENDANT

INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION...2ND DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 13th December, 2011 the Plaintiff filed suit against the Defendants seeking orders inter alia to stop the 2nd defendant from exercising its statutory power of sale in respect of all that parcel of land known as KERICHO/KAPSIMBIRI/154 on account of a loan advanced by the 2nd defendant to the 1st Defendant in 1991.

2. A brief background of the case is that the plaintiff is the son and administrator of the estate of Moses Kipkosgei Tesot –Deceased who was the 1st registered proprietor of land parcel number KERICHO/KAPSIMBIRI/154. 3. On 6th July, 1990 the 1st Defendant caused the suit property to be transferred to Leah Cherotich Tesot –Deceased who was the wife of the late Moses Kipkosgei Tesot. The said transfer was effected without the consent of the plaintiff and other beneficiaries of the estate of Moses Kipkosgei Tesot and without obtaining a certificate of confirmation of grant. The 1st defendant thereafter persuaded the said Leah Cherotich Tesot to charge the suit property to the 2nd defendant to guarantee a loan of Kshs. 100,000 which was advanced to the 1st defendant by the 2nd defendant. The 1st defendant subsequently failed to repay the loan after which the 2nd defendant sought to exercise its statutory power of sale in 2011. This was 20 years after the loan was advanced and six years after the death of the chargee (Leah Cherotich Tesot)

4. It is the plaintiff's case that both the transfer of the suit property and the 2nd defendant's exercise of its statutory power of sale were unprocedural and unlawful. The plaintiff therefore seeks the following reliefs:

a. A declaration that the transfer dated 6th July 1990 and the charge dated 6th August 1991 in respect of all that land known as KERICHO/KAPSIMBIRI/154 are null and void and consequently the District Land Registrar Bomet be ordered to cancel the said registration.

- b. A declaration that the 2nd defendant is estopped from exercising its statutory power of sale over all that parcel land known as KERICHO/KAPSIMBIRI/154
- c. A declaration that the 2nd defendant's statutory power of sale has been extinguished by the statute of limitation and it can therefore not sell the suit land by public auction or private treaty or at all.
- d. In the alternative and without prejudice to the foregoing, an order to be made for taking of accounts.
- e. A permanent injunction restraining the 2nd defendant from exercising its purported statutory power of sale in respect of all that parcel of land known as KERICHO/KAPSIMBIRI/154 and in particular the 2nd defendant and its agents M/SADDABRI AGENCIES be restrained from selling, advertising for sale, entering, foreclosing, managing and/or in any way dealing with the said land.
- f. Costs of this suit.
- g. Any other relief as the court may deem fit to grant.

5. In its Defence dated 10th January 2012 the 2nd defendant states that if the transfer of the suit land to the late Leah Cherotich Tesot was unlawful, the 2nd defendant was not involved in the said transaction. The 2nd defendant further states that the 1st defendant admitted its indebtedness to the 2nd defendant and submitted certain repayment proposals which it failed to meet. The 2nd defendant therefore states that it is entitled to exercise its statutory power of sale as it followed due process. The 1st defendant did not file any defence.

6. Even though the hearing date was taken by consent, the defendants did not attend court and the case proceeded ex-parte.

7. The Plaintiff testified in terms of his statement dated 13th December 2011 and produced the documents listed in the Plaintiff's List of documents dated 13th December 2011. Learned counsel for the plaintiff subsequently filed his submissions.

8. In his submissions, counsel raises a number of issues; First he argues that the 2nd defendant is barred by section 19 of the Limitation of Actions Act Cap 22 of the Laws of Kenya from exercising its statutory power of sale.

9. Section 19(1) of the said Act states as follows:

“An action may not be brought to recover a principal sum of money secured by a mortgage on land or moveable property or to recover proceeds of the sale of land after the end of twelve years from the date when the right to receive the money accrued”

10. Secondly, counsel submits that the second defendant is estopped from charging interest on the principal sum in excess of the principal sum from the time the loan became non-performing in line with section 44A of the Banking Act Cap 488 of the Laws of Kenya. The said section which contains the *In Duplum* rule provides as follows:

“An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection 2.

Subsection 2 of the same section provides as follows:

The maximum amount referred to in (1) is the sum of the following-

- a. The principal owing when the loan becomes non-performing;
- b. Interest in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and
- c. *Expenses incurred in the recovery of any amounts owed by the debtor*”

11. Thirdly, counsel submits that the 2nd defendant’s purported exercise of its statutory power of sale was unlawful as it did not serve the chargor with a statutory notice. It is counsel’s submission that by the time the 2nd defendant purported to sell the suit property in 2011, the chargor (Leah Cherotich Tesot was long dead. She died in October 2006). It is therefore inconceivable that she could have been served with a statutory notice.

12. Counsel finally submits that the transfer of the suit property from Moses Kipkosgei Tesot -Deceased to the late Leah Cherotich Tesot was fraudulent and unlawful and the illegal title could therefore not be charged to secure a loan to the 1st defendant.

Issues for Determination

13. From the foregoing, the following issues emerge for determination:

- i. Whether the 2nd defendant is barred from exercising its statutory power of sale by dint of section 19 of the Limitation of Actions Act Cap 22 of the Laws of Kenya.
- ii. Whether the *in duplum* rule applies to this case.
- iii. Whether the 2nd defendant’s exercise of its statutory power of sale was unlawful.
- iv. Whether the transfer of the suit property to the late Leah Cherotich Tesot was unlawful and if so, whether the 2nd defendant obtained a good title for purposes of securing the loan to the 1st defendant.

Analysis and Determination

14. In order to determine the first issue, I rely on the case of **Desires Derive V Britam Assurance Co Limited (2016) eKLR** where the court citing the case of **Rajnikantkhetshi V Habib Bank A.G Zinch (2016) eKLR** stated as follows:

“ These arguments are quite robust and useful but one matter stands out and is agreed by both parties. The charge herein is still subsisting on the suit property. In my considered opinion as long as the charge is subsisting and has not been discharged, the cause of action consisting in a discharge of charge is unaffected. Similarly, unless there exist circumstances to the contrary, as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive”.

15. Since the debt herein also remains unpaid, I find and hold that the 2nd defendant is not barred from exercising its statutory power of sale under section 19 of the Limitation of Actions Act.

16. With regard to the second issue, the plaintiff has put up a spirited fight to the effect that the *In duplum* rule applies and the 2nd defendant is estopped from charging interest that is more than double the principle sum. The *In Duplum* rule which was given statutory clothing by section 44A of the Banking Act (Amendment No. 6 of 2006) is applicable to institutions as defined under the Act. A schedule to the Central Bank of Kenya Act has a list of Banks and Financial Institutions which are bound by the In Duplum rule. The 2nd defendant is not one of them.

17. The third issue is whether the 2nd defendant's exercise of its statutory power of sale was lawful. Under section 96(2) of the Land Act "before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least 40 days have elapsed from the date of that notice to sell."

18. The 2nd defendant may have dispatched a statutory notice to the chargor's last known address but it is clear from the death certificate produced by the plaintiff that the chargor had died five years prior to the date of the said notice hence the notice was null and void.

19. Be that as it may, it is not in dispute that the loan taken by the 1st defendant is still outstanding. The only lapse on the part of the 2nd defendant is that it failed to confirm if the chargor was still alive before issuing the notice. The outcome of this would not be to permanently injunct the 2nd defendant from pursuing the legal options available to it under the law but to ensure that they exercise those options in accordance with the law.

20. The fourth and last issue is whether the transfer of the suit property to the late Leah Cherotich Tesot was unlawful. The plaintiff testified that the transfer of the suit property was made before obtaining a grant of letters of administration in respect of the estate of the late Moses Kipkosgei Tesot. However, no evidence was adduced to show that the 2nd defendant was party to the said unlawful transfer nor, could it possibly have known that the transfer was unlawful. In the case of **Mary Ngaru V Family Bank Ltd & 2 Others (2014) eKLR** the court faced with a similar situation held as follows:

"By charging the suit property the 2nd defendant neither acted unlawfully nor breached any known law".

21. Indeed, the Registered Land Act under which the suit property was registered and charged had the following provision which absolves the 2nd defendant from any blame:

22. Section 39 of the Registered Land Act (Now repealed) states as follows:

"No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned

a. To inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered."

23. In view of the foregoing, it is my finding that the plaintiff has partially proved his case. I therefore enter judgment for the plaintiff in terms of prayer (d) of the plaint and direct as follows:

a. That the 2nd defendant do furnish the plaintiff and 1st defendant with accounts of the loan outstanding in order for the plaintiff and 1st defendant to make arrangements to pay.

b. That the 2nd defendant shall only exercise its statutory power of sale after issuing the requisite statutory notices and in strict compliance with the law.

c. I make no order as to costs.

Dated, signed and delivered at Kericho this 6th day of April, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Ngetich for Mr. Koske for the Plaintiff
2. No appearance for the Defendant
3. Court Assistant - Rotich