



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 14 OF 2015

JOSEPH MUIGAI WANENE.....PLAINTIFF

- VERSUS -

KENYA COMMERCIAL BANK LIMITED..... DEFENDANT

JUDGMENT

1. *Joseph Muigai Wanene* the plaintiff, filed this case on **14th January 2015** against Kenya Commercial Bank Ltd the defendant. Following a notice for mediation by the Deputy Registrar of this court, dated **7th April 2016**, the parties in this case subjected themselves to mediation process. A mediation agreement was reached on **25th October 2016** and as a consequence thereof parties resolved the other issues in the matter but left the following issues for determination by this court. Those issues are:

- a. The issue regarding the valuation of the suit property to be determined by the court.*
- b. The issue of whether the sale of the property was conducted maliciously should be determined by the court.*
- c. Whether the plaintiff is entitled to general damages should be determined by the court.*

2. At the commencement of the trial the learned advocate for the parties informed the court that those were the issues for determination. The learned advocate summarised those issues as follows:

- a. Was the sale of the charged property by the defendant malicious.*
- b. If the answer to the 1st issue is positive, is the plaintiff entitled to damages.*

PLAINTIFF'S CASE

3. The plaintiff obtained financial facility from the defendant in **July 1991**. As security for that facility the plaintiff charged his property title **Kajiado/Ntarshat/1422** (herein after referred to as the charged property). The plaintiff concedes that he defaulted in the repayment of that facility. This led to the defendant notice of its intention to exercise its statutory power of sale over the charged property.

4. The defendant sold the charged property by public auction on **3rd January 2012** for **Ksh 1.2 million**.

5. The plaintiff pleaded that the defendant and its appointed agent, Phtuma Agencies, the auctioneers failed to carry out valuation of the charged property to establish its open market value. This the plaintiff pleaded was breach of the defendants statutory obligation. The particulars of the alleged breach by the defendant, were stated in the plaint to be failure to obtain valuation before auctioning the charged property, failure to market the property sufficiently, purporting to sell the charged property work Ksh 65 millions for Ksh 1.2 million, failing to inform the plaintiff of the auction and failing to account for the sale proceeds. The plaintiff therefore contends that the defendant acted with malice, callously, unprofessional and that the whole process was shrouded in mystery.

DEFENDANT'S CASE

6. The defendant denies the plaintiff's case. In its defence through the evidence of its witness **Bertha Oduor** the defendant stated that prior to charging the charged property, there was a valuation by Mathu and Associates undertaken on **24th June 1991** and which value was stated to be **Ksh 3 million**. There was another valuation by Ebony Estates Limited on **19th March 1993** for **Ksh 7 million**. On **23rd May 1997**, Kahuthia Kibui & Company valued the charged property at **Ksh 2 million**. On **22nd December 2010** prestige Management Valuers Ltd gave the open market value of the charged property at **ksh 1.5 million**, the mortgage value at **Ksh 1.2 million** and forced sale value at **Ksh 800,000**. That valuer indicated that the reserved price should be **Ksh 700,000**.

7. The defendant by its letter of **7th February 2011** sought to know from Prestige Management Valuers Ltd the basis of their valuation. The response was by letter dated **10th February 2011** whereby Prestige Management Valuers Ltd stated that the value was affected by the cultural community land ownership in the area. I shall reproduce that response as follows:

"10th February, 2011

Kenya Commercial Bank Limited

Head Office Moi Avenue

p. o. Box 48400-00100

NAIROBI

ATTN: Mr Komen

Dear Sir,

RE: VALUATION OF L.R. NO. KAJIADO/NTASHART/1422.

KAJIADO DISTRICT

The above captioned refers and advise as follows:

- i. The subject property is located in an area which is remote, inaccessible and rather dry area of Kajiado where its not settled and the main economic activity is nomadic cattle rearing.*
- ii. The cultural community land ownership is prevalent and private land ownership is seldom respected.*
- iii. Our field survey, data collection and subsequent analysis of the property revealed that an acre of land within the neighbourhood as per the general open property market conditions could fetch an average of Ksh 15,000/= . Even then the property market here is highly inactive.*
- iv. We also note that valuation is based on an independent opinion depending on the market*

prevailing conditions at the time of the valuation. Your comment that property prices would go up than otherwise is well in tandem with general market trends.

v. Like we noted in our valuation report the subject property is not, in our opinion, a good security and is not easy to sell in a public auction.”

8. The defendant denied that the auction was actuated by malice and its witness stated that the sale only took place after the plaintiff failed to honour his undertaking to pay the outstanding amount of his loan. Further the defendant’s witness stated that in execution of the auction, the auctioneer followed due process by issuing 45 days notice. That although the charged property was sold on **3rd of January 2012** at **ksh 1.2 million**, that the plaintiff did not request for information about that sale until 2 years later.

9. In view of the above the defendant denied that the plaintiff is entitled to his claim for damages.

ANALYSIS AND DETERMINATION

10. This court by its order of **22nd December 2016**, requested the government valuer to carry out a valuation of the charged property. That valuation was carried out and the report was filed in court on **20th February 2017** which I shall reproduce below:

“The Deputy Registrar

High Court of Kenya

Commercial and Admiralty Division

Milimani Law Court

NAIROBI

Dear Madam/Sir

RE: HCCC NO.14 OF 2015

**JOSEPH MUIGAI WANENE –VS – KENYA COMMERCIAL BANK LIMITED
VALUATION OF LAND PARCEL TITLE NO. KAJIADO/NTASHART/1422 (IN
SAIKERI GROUP RANCH KAJIADO COUNTY**

Pursuant to the court order of 22nd December 2016 we now have the pleasure to present the following report and valuation.

REPORT AND VALUATION

Date of Inspection: 16th January 2017

Parcel No: KAJIADO/NTASHART/1422

Area: 42.0HA/103.782 Acres or thereabouts

Situation:

Approximately 10Km to the South of Ngong Township and also approximately 5 km to the south east of Saikeri Market Centre.

The land:

Generally flat terrain surrounded by hills having loam soils and vacant. Main vegetation is thorny shrubs. There is no electricity or piped water.

Ownership:

Prior to the year 2012, the land was registered under the names JOSEPH MUIGAI WANENE in absolute proprietorship but has since been subdivided into four (4) parcels all of which are now registered under the names of other persons.

Valuation Methodology:

The valuation methodology applied is the comparable market approach as at January 2012.

Valuation:

The market value of the land title no. **KAJIADO/NTASHARTI/1422 as at January 2012 was Ksh 10,300,000/= (TEN MILLION, THREE HUNDRED THOUSAND SHILLINGS)**

S.M. MUHORO

FOR: DIRECTOR OF VALUATION

11. The plaintiff's case, and the issues identified by the parties come down to the question whether the defendant in exercising its power of sale, failed to obtain valuation of the charged property. Indeed the plaintiff's allegation is that because the defendant did not get a valuation before conducting the sale that that sale was tainted by malice. It is for that reason that the plaintiff in his evidence stated that he wished to be compensated by the defendant.

12. The burden of proof was upon the plaintiff to prove the malice or that the sale of the charged property was sold at an under value.

13. The plaintiff did not produce any valuation, which would contradict what was produced by the defendant. The plaintiff instead relied on the report tabled before court by the government valuer.

14. It is useful at this stage to consider the provisions of section 107 of the evidence act cap 80 which provides:

“whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

15. What the different valuations referred to above revealed to me is that the valuation of property is not an exact science. How else can one explain the different valuations placed before me. Mathu & Associates valued the charged property in **June 1999 at Ksh 3 million**, “Ebony Estates Ltd gave their value on **19th March 1993 at Ksh 7 million**, Kahuthia Kibui's valuation of **May 1987 was Ksh 2 million**, Prestige Management Valuers Ltd on **22nd December 2010** gave an open market value of **Ksh 1.5 million**, a mortgage value of **Ksh 1.2 million** and a forced sale value of **Ksh 800,000**.

16. It is the latter valuation that assisted the defendant to give a reserve price of **ksh 700,000**. The charged property however was sold in **January 2012 at Ksh 1.2 million** at a public auction.

17. As stated before, Prestige Management Valuers gave reasons when asked by the defendant, why they gave the stated value to the charged property.

18. The valuation given by the government valuer is in my view very inadequate. It is reproduced above

in this judgment and as it will be seen it contained very limited information about the charged property contrary to the other valuers who were instructed by the defendant. Those valuers gave details of the charged property. For example, Prestige Management Valuers Limited gave the following remarks of the charged property:

“This property is located in a semi-arid region where crop cultivation cannot do well. Although the land has not been set aside public use that fact that the land has limited economic use and that access is extremely poor may hold off potential buyers in an eventual public auction. Infact for mortgage purposes this property is not a good security and its value is nominal and this fact in our opinion may hold on in the foreseeable future.

The land is currently fallow with dry grass forming the major vegetation cover. This land is suitable only for pastrolist livestock herding as the rainfall regime in this area is very poor and the culture of unalienable individual property rights has not taken root among the local community.

The property has not in the past been set aside for any public use.”

19. As stated before the burden of proof lay with the plaintiff. In my view that burden did not shift to the defendant. See Section 109 of Cap 80. The plaintiff did not attempt to discredit the defendants valuation particularly the one that the defendant relied upon in setting up the public auction. It was incumbent upon the plaintiff to meet the burden of proof, which in my view he did not. He did not call evidence of a valuer who could have testified on the failures, if any of the defendants valuation. The plaintiff needed to adduce evidence to discredit the valuations relied upon by the defendant. In this regard I rely on the case **Olkasasi Limited Vs Equity Bank Limited [2015] eKLR** where the court stated:

“it is not sufficient for the applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation Reort. The applicant must satisfactorily demonstrate why the valuation report that the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.

Kasango J went ahead to state:

The Applicant needs to show, for instance, that the Respondent’s valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale. The Applicant has not raised any of such grounds.”

20. Similarly, in this case the plaintiff has failed to prove on a balance of probability that the defendant failed to obtain a valuation or failed to obtain the best price. The plaintiff also failed to prove malice on the defendant’s part.

21. In view of the above finding, there is only but one conclusion to this case. This case is hereby dismissed with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE