



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.302 OF 2004

TABERE CLEARING AGENCY LIMITED.....PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING

CORPORATION LIMITED..... 1ST DEFENDANT

BURNABY PROPERTIES LIMITED.....2ND DEFENDANT

JOSEPH MUNGAI GIKONYO T/A

GARAM INVESTMENTS3RD DEFENDANT

JUDGEMENT

1. When this suit was filed on 5th June, 2004, the purported sale of Land known as Kabete/Lower Kabete/70 (the suit land) had not happened. Together with filing the Complaint, Tabera Clearing Agency Limited (The Plaintiff) filed an Application for Injunction seeking to stop the Public Auction of the Suit land which was due to take place on 10th June 2004.
2. Events which are complained of by the Plaintiff and which are said to have happened on the said day of 10th June 2004, necessitated an Amendment to the Plaintiffs Pleading. The Amended Complaint dated 4th August 2006 and filed on 11th August 2006 now sets out the Plaintiff's cause of Action.
3. It is pleaded by the Plaintiff that by an offer made by Southern Credit Banking Corporation (the 1st Defendant which was accepted by the Plaintiff) agreed to advance a sum of Kshs.2,600,000/= to the Plaintiff. That facility was guaranteed by Grace Wanjiku upon security taken in respect to the suit land.
4. The Plaintiff complains of a fundamental change in the agreement allegedly on account of change of interest rate on the facility from 31% to 38%.
5. The Plaintiff contends that he repaid the Principal amount and agreed interest. And would have been surprised when on 22nd May 2004, the Plaintiff was informed by the 3rd Defendant as an agent for the 1st Defendant that it was owing a sum of Kshs.17,483,824.30.
6. It is the Plaintiff's case that on taking professional advice from the Interest Rates Advisory Centre

(IRAC)the amount due and owing would be less than Kshs.2 million. And having sought explanation from the 1st Defendant as to the figure of Ksh.17,483,824.30, no satisfactory explanation has been forthcoming.

7. The suit land was advertised for sale by Public Auction set for 10th June 2004. The Plaintiff contends that the Defendants Statutory Notice for Sale of the suit land was premature, illegal, null and void. It further states that it is still ready and willing to redeem the Account.

8. On the Public Auction, it is averred by the Plaintiff that it did not take place at 10.30am but that the Agents of the 1st Defendant who double up as agents of the 2nd Defendant visited the place of Auction at 3pm and purportedly started bidding for the suit land. That this would be in breach of the Auctioneers Act and Rules and particulars of breach are set out in paragraph 11 of the Amended Plaintiff. It is said that the Auctioneer was not seized of territorial jurisdiction to conduct the sale. The place of Auction was not accessible to members of the Public. The suit premises for sale were not called out and/or identified and no bids were invited. In addition the highest bidder was not identified. It is also contended that the 3rd Defendant purported to sell the suit premises for Ksh.5,500,000/= when no Public Auction took place.

9. On another front it is alleged that the Defendants have jointly and/or severally wrongfully and fraudulently conspired to deprive or alienate the suit premises by the purported Public Auction. The particulars of fraud are set out in paragraph 17 of the Amended Plaintiff.

10. In the end the Plaintiff states that the suit land is the residence of the Plaintiff's Directors and they would be rendered destitute if the transfer was allowed to proceed. The prayers sought by the Plaintiff against the judgement are for:-

- a) An injunction restraining the 1st and 3rd Defendants from selling and/or in any other manner alienating the suit premises.
- b) A declaration that the purported sale for the suit premise is illegal, null and void.
- c) An order for Account of the sale and interest.
- d) Such or further orders as the Court may deem fit to grant in the interest of justice.

11. The Plaintiff's action was resisted and the Defendants filed a joint Statement of Defence and Counterclaim dated 6th February 2014. Briefly the Defendants state that the Defendant Bank granted a principal loan of Ksh.2,600,000/= the Plaintiff and the same was secured by a charge over the suit land which is registered in the name of Grace Wanjiku.

12. That there was default in repayment of the facility and that as at April 30, 2004, a sum of Kshs.17,483,824.30 was due. This warranted the recovery through sale of the suit property. That the interest charged was lawful and charged in accordance with the terms agreed between the Bank and Borrower. The Bank defends the Sale by Public Auction and states that it was in exercise of its Statutory Power of Sale.

13. The Defendants deny impropriety or unlawfulness of the Auction as alleged by the Plaintiff or at all. The Defendants maintain that the Auction was properly conducted after proper Notification of Sale had issued and proper procedure followed.

14. In respect to the Sale price, the Defendants aver that the open market value of the Suit property was Kshs.5,000,000/= and a forced sale/reserve price of Kshs.3,500,000/=. That the property was sold to the 2nd Defendant who was the second highest bidder as the highest bidder was unable to raise the requisite Deposit and therefore disqualified himself. The 2nd Defendant bought the property at Kshs. 5,000,000/=. This, it is emphasized, is higher than the reserve price.

15. An intended transfer of the suit property to the 3rd Defendant was not successful as Grace Wanjiku (the Registered Proprietor owner) lodged a caution against the property and the Land Control Board at Kiambu declined to consent to the transfer until the determination of this suit.

16. In the Counterclaim the Defendants pray for the following substantive prayers:-

- a) The Plaintiff's suit be dismissed with costs together with interest thereon for such period and at such rate as the Court may determine.
- b) A declaration that the sale of the property known as L.R No. KABETE/LOWER KABETE/70 NAIROBI was lawful.
- c) An order for vacant possession of property known as L.R No. KABETE/LOWER KABETE/70 NAIROBI to be granted to the 2nd Defendant herein.
- d) An order that the Plaintiff and, or its agent be evicted from the said parcel of land being L.R. No. KABETE/LOWER KABETE/70 NAIROBI.
- e) An order that the District Land Registrar Kiambu do forthwith and unconditionally remove the caution registered against L.R No. KABETE/LOWER KABETE/70 NAIROBI by Grace Wanjiku or any other person.
- f) An order that upon removal of the said caution, the District Land Registrar Kiambu do forthwith and unconditionally effect a transfer of L.R No. KABETE/LOWER KABETE/70 NAIROBI to the 2nd Defendant herein and or its nominees.
- g) Costs of this suit and of the Counterclaim together with interest thereon for such period and at such rate as this Honourable Court may deem appropriate.

17. In a Reply to Defence and Defence to Counterclaim dated 21st February 2014, the Plaintiff answers to the issues raised in the Defendants Pleadings.

18. This matter was heard on 1st November 2016 and 9th December 2016. On both occasions, although served, neither the Defendants nor their Counsel attended Court.

19. Albert Thande (PW1) is a Director of the Plaintiff Company. The Company is a Custom Clearing Agency as well as a Transporter. It required financial accommodation. In the course of negotiating the facility, one of the Directors of the Company showed to the Bank a house under construction on the suit land. The suit land was to be offered as security for the facility to be advanced.

20. The Defendant carried out a Valuation of the house and since Kshs.2.6 million was required to complete the house, the Defendant Bank agreed to give that amount to the Plaintiff.

21. That a charge was prepared and they (presumably him and Grace Wanjiru) were given the last page to sign. That they did not read or even see the contents of the charge. In addition they were never given a copy of it. Nevertheless, they surrendered the Title to the Bank.

22. He testified that he repaid the loan by depositing cash and cheques over the Counter but the Bank's Cashiers would never give him any deposit slips.

23. The Bank started to make demands for payment and when PW1 Sought Statements, none were given. Eventually, however, he got a Statement in May 1993. This enabled him to visit IRAC for advice. He was advised that there was a Credit in his favour as the Credits pending were Kshs.3,830,494/= against debits of Kshs.3,520,227.00/=.

24. The Plaintiff then reiterated the averments he has made in the Plaint in respect to the wrongful sale of his property, the flaws and irregularities of the Auction and the fraud committed by the Defendants.

26. Mr. Wilfred Abinch Onono (PW2) is a member of the Institute of Certified Public Accountants and the Managing Director of IRAC. He explained that IRAC specializes in financial consultancy and undertakes objective and independent audit of borrowing contracts and interest recalculations.

26. On the instructions of the Plaintiff, IRAC carried out a recalculation of interest charged on Account Number 14673 with the Defendant Bank. In respect to his report of 19th April 2004, he concluded that:-

“The re-calculation difference in the outstanding cleared balance as at 31st March 2003 between Southern Credit Bank debit of Kshs.11,069,841.05 and IRAC’s debit balance of Kshs.1,935,867.63 is Khss.10,033,983.42 in favour of Tabera Clearing Agency”.

27. Upon considering the pleadings, the evidence and submissions filed herein the Court formed the view that it needed to determine the following issues:-

- a) Can the Plaintiff maintain the Cause of Action in the Plaint and the Prayers sought?
- b) Was the exercise of the Plaintiff’s Statutory Power of Sale unlawful?
- c) Was the Sale fraught with the irregularities set out in the Plaint?
- d) If the answer to (b) and/or (c) is in the affirmative, what remedy, if any, is available to the Plaintiff?
- e) What order should be made in respect to the unprosecuted Counterclaim?
- f) What is the suitable order of costs?

28. The uncontested evidence is that some Kshs.2,600,000/= was advanced to the Plaintiff by the 1st Defendant Bank. As security therefor a charge was taken over the suit land which is registered in the name of Grace Wanjiku. Grace Wanjiku is the mother of PW1.

29. There is no dispute that as of the date the Defendant Bank put up the property for Sale, the Plaintiff had defaulted in repayment of the loan. What is in contention is the amount due and owing to the Bank. The Bank was demanding Kshs.17,483,829.30 but IRAC had advised the Plaintiff that Kshs.1,935,857.63 would be the just amount that was due from it to the Bank.

30. Although the Plaintiff alleged that no Public Auction took place at 10.30am on 10th June 2004 and that the place of Auction was inaccessible to the Public, no evidence was led in this respect. There was also no evidence that the Auctioneer was not possessed of Territorial Jurisdiction to carry out the Auction.

31. Equally unproved by way of evidence was that the 2nd and 3rd Defendants are sister companies, or the Sale was pre-arranged, or that the deposit and/or sale price was unpaid.

32. Even if these allegations had been proved, it is doubtful that the Plaintiff alone can maintain a cause of action in respect to the Prayers sought in the Plaint. Those Prayers, which bears repeating, are for:-

- a) An injunction restraining the 1st and 3rd Defendants from selling and/or in any manner alienating the suit premises Kabete/Lower Kabete/70.
- b) A declaration that the purported sale of the suit premise is illegal, null and void.
- c) Order for account of the Sale and Interest.

33. The Prayers seek to protect a Chargor's equity of redemption and an order for account in respect to sale of the charged property. The Abstract of Title to the suit land shows that the suit land was at the date of sale registered under the provisions of the now Repealed Registered Land Act 300. That would be the statute applicable to this dispute. Under the proprietorship section of the title, the Registered Proprietor of the Land is Grace Wanjiku. This is admitted by the Plaintiff. The Plaintiff has no proprietorship rights over that suit land. This is not contested by the Plaintiff.

34. It is my view, that not being the proprietor of the suit land and not having power of Attorney from the Registered Proprietor, the Plaintiff suing alone as it does cannot seek to enforce the Equity of Redemption and obtain the Prayers sought. That right inheres in the registered proprietor/chargor to the suit land.

35. A little more need to be said in respect to prayer (c) of the Plaint. The order sought is an account of the sale and interest from the Public Auction. It is an account in respect to proceeds obtained in exercise of Statutory Power of Sale by a Chargee. This is what Section 78 of The Registered Land Act(Repealed) provides on the application of the purchase price received by a Chargee who has exercised its Power of Sale:-

“The purchase money received by a Chargee who has exercised his power of sale, after discharge of any prior encumbrances to which the sale is not made subject or after payment into court of a sum sufficient to meet any such prior encumbrances, shall be applied-

(a) first, in payment of all costs and expenses properly incurred and incidental to the sale or any attempted sale;

(b) secondly, in accordance with any express provision in the charge (as required by section 65 (5)) for disposing of such money and, in the absence of any such express provision, in discharge of the money due to the Chargee at the date of the sale; and

(c) thirdly, in payment of any subsequent charges in the order of their priority, and the residue of the money so received shall be paid to the person who immediately before the sale was entitled to redeem the charged land, lease or charge”. *(my emphasis)*

After payments made in respect to (a), (b) and (c), any residue of the money is paid to the person who immediately before the Sale was entitled to redeem the charged land, lease or charge. In this case that person would be the chargor herein, Grace Wanjiku and not the Plaintiff. The Plaintiff cannot therefore seek an account for monies that would never be due to it.

36. Even if I was wrong in my appreciation of the law, it still seems to me that the events of 10th June 2004 extinguished the Equity of Redemption of the Chargor. The provisions of Section 72(1) of The Registered Land Act are clear:-

“(1) Subject to this section, a Chargor, on payment of all money due and owing under the charge at the time of payment or on fulfillment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on him by section 74, may redeem the charged land, lease or charge at any time before it has been sold under section 77, and any agreement or provision which purports to deprive the chargor of this right of redemption shall be void; and, for the purposes of this subsection, land, a lease or a charge shall be deemed to have been sold when a bid has been accepted at the auction sale”.

37. On 28th November 2012 Visram JA in a Court of Appeal Decision in **Savings & Loan Kenya Limited Vs. Mayfair Holdings Limited**[2012] eKLR said as follows:-

“The charged property in this case was registered under the RLA Section 71(1) of the RLA is categorical that the Chargors right of redemption over the charged property is extinguished when the property is sold by the charge in exercise of its Statutory Power of Sale. Under the same provision the property is deemed to have sold at Public Auction and a bid has been accepted”.

38. The evidence tendered by the Plaintiff did not disprove that a Public Auction took place or that the bid by the 2nd Defendant was not accepted by the 3rd Defendant on behalf of the first Defendant. Upon the acceptance of the bid the Equity of Redemption of Grace Wanjiku over LR No. Kabete/Lower Kabete/70 was extinguished.

39. The position would not change even if the Court was to find that the debt due was only Ksh.1,935,875.63 and not the Kshs.17,483,829.30 demanded or that there were some irregularities in the manner in which the Public Auction was arranged and/or conducted because the remedy available to the chargor is a suit for Damages.

40. Yet it is not lost on this Court that suit land has not been transferred to the purchaser (the 2nd Defendant) at the auction and an argument can be made that although the sale took place the Chargors Equity of Redemption has not extinguished. There is a view that section 77(4) of the Registered Land Act (Repealed) delays the extinction of the Equity of Redemption (**Mbuthia vs. Jimba Credit Corporation and Another** (1988) KLR. Section 77(4) provides:-

“(4) Upon registration of the transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge, or on account of any other encumbrance to which the charge has priority (other than a lease, easement or profit to which the chargee has consented in writing)”.

41. Still the Plaintiff’s claim would fail because, on its own admission, the Plaintiff had defaulted in the repayment of the debt. The Bank was therefore entitled to exercise its statutory power of sale and it would matter not that the debt was Kshs.1,935,857.63 as admitted by the Plaintiff and not Kshs.17,483,829.30. Secondly, the Plaintiff’s evidence did not successfully fault the manner in which the Auction was arranged and or conducted.

42. For the reasons given, the Plaintiff’s suit is without merit and is hereby dismissed.

43. As to the Counterclaim, the Defendants failed to attend Court to prosecute it and as no part of their Counterclaim was admitted by the Plaintiff, it is hereby also dismissed.

44. The costs I would have awarded to the Defendants for the main claim should cancel out with the costs I would have awarded to the Plaintiff for the dismissed Counterclaim. For that reason each of the parties to this suit shall bear their own costs.

Dated, Signed and Delivered in Court at Nairobi this 4th day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Kingara for Plaintiff

N/A for Defendant

Alex - Court Clerk