

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 3659 OF 1987

NJAU.....PLAINTIFF

VERSUS

NUKUNA & ANOTHER.....DEFENDANT

JUDGMENT

July 19,1989 A M Cockar Judge delivered the following judgment

The plaintiff's evidence is that he noticed that the suit premises were advertised in daily nation of November 17, 1986 for sale by public auction on December 3, 1986. he did not attend the auction. Later in the daily nation of December 19, 1986 he saw the suit premises being advertised for sale by Rainbow, Land Estate Agent. He contacted the proprietor Mr Simon Nyotu and it was agreed that Mr Nyotu would sell the suit premises to him for Kshs 125,000. Sale agreement (exh 1) was prepared by M/s Kameme & co advocates, and executed. The plaintiff produced 3 receipts for a total sum of Kshs 104,000 that he had paid at Mr Kamere's office (Exh 4). The balance he said he paid directly to Mr.Nyotu. He explained that Mr Nyotu had bought the land at the auction but being a land and estate agent he had not got the land transferred and registered in his own name but had sold it to him, the plaintiff, directly after he had bought it at the auction. The land was eventually transferred and registered in his name – certified copy of land certificate (Ex 5).

The plaintiff said that he never applied for Land control Board's consent. Mr Nyotu under the agreement of sale was to do that and the consent was obtained on December 16, 1986. The two defendants who were living on the suit premises had refused to vacate even after an advocate's notice (exh 6 dated June 28, 1987) was sent to them.

For the defence evidence was not given by either of the two defendants. Mr James Kaigai Kariuki (DW 1), the eldest son of the 1st defendant and a brother of the 2nd defendant, was the only witness for the defence. He was a hardware businessman since 1982. He said that their family consisting of their mother, 5 brothers, 2 sisters, and the children of all of them lived in the suit premises of which their father Kariuki Kaikai was the registered owner. His late father had made him responsible for everything. He became aware of this matter for the first time in March, 1987, when his mother brought him an order from Kamere & Co advocates, for them to be evicted. His search at the Kiambu land registry revealed that the land had been purchased by the plaintiff. Neither he, nor the 1st defendant, nor the 2nd defendant had been served with any notice of sale nor had any of them been informed of the auction.

The District commissioner Kiambu on learning of the position arranged for the sub-chief of the area to call a meeting on May 24, 1987 of some people including the plaintiff and presided over by the chief. At this meeting it was agreed that the plaintiff be refunded a sum of Kshs 180,000. The plaintiff refused to accept. DW 1 continued that on February 23, 1978 the property had been mortgaged to Kenya commercial Bank by their father by way of guarantee for a loan of Kshs 80,000 advanced to DW1's younger brother Joseph Wanjohi Kariuki who had started the business of Master Office Suppliers Ltd, in 1978. The brother had not done anything towards repayment of loan which had accumulated to Kshs 328,000. Whereas the market value of the land in that area was Kshs 9,000 per acre the bank had recovered Kshs 90,000 only for the whole of the plot and the balance was still a debt.

To my mind the defence evidence was completely irrelevant as far as the plaintiff's claim is concerned. The plaintiff is the registered owner and he had bought the suit premises from a land and estate agent. Allegations of non-service of notice to sell or complaint over the price at which the plot was sold are matters on which the bank only can testify. The plaintiff is not even remotely connected with the sale through auction conducted on instructions of the bank.

The question of irrelevancy of the defence evidence apart DW 1 did not strike as a person who had any regard for truth. In para 7 of his replying affidavit he has deponed that the chargees had sold the land to the plaintiff. This, as the evidence I court revealed, clearly was a wild and irresponsible deposition without any proper steps having been taken to check the true state of affairs. In para 3 of his affidavit DW 1 has deponed that he lived on the suit premises with his mother and 5 younger married brothers with families and a younger unmarried sister. It transpired during his crossexamination tht neither DW 1 himself nor his wife lived on the suit premises.

I am not in the least impressed on the credibility of this witness. Neither of the two defendants who lived on the suit premises nor mr Joseph Wanjohi Kariuki for whose benefit the property had been charged and who also lived on the suit premises was called to give evidence particularly in relation to service of notice of sale.

The advertisement for sale by public auction (Ex 2) in daily Nation is prominently displayed. It also states that auction was being conducted on instructions of M/s Hamilton Harrison & Mathews who clearly were acting on behalf of the bank. This firm of advocates is well and is of a long standing. It is hardly likely that they had not strictly complied with the requirements regarding service of notice of sale of the charged property – the suit premises. Both Mr Joseph Wanjohi Kariuki and DW 1 were businessmen. DW 1 was an educated person. It is hardly likely that neither of them had noticed the advertisement of sale in the daily Nation. I reject the evidence of DW 1 when he says that no notice of sale was served or that none of them had become aware of the advertisement of sale. I also reject that DW 1 had not been aware of the loan advanced by the bank for the benefit of his brother or of the charge until the notice from Kamere & co advocates, was brought to him.

I have already pointed out that the above allegations should have been directed against the bank. The plaintiff had nothing to do with these allegations which I have also found have no merit at all. I reject the defence put up by way of the replying affidavit of Mr James Kaigai Kariuki (DW 1). I accept the plaintiff's evidence and I find that the grounds on which his prayers in the originating summons are bound have been proved. Neither of the defendants has any legal right to be in the suit premises. I give judgment for the plaintiff in terms of orders No 1,2 and 4 prayed for in the originating summons. Costs shall be taxed as in case of a suit filed by way of a plaint.

Dated and delivered at Nairobi this 19th day of July ,1989

A M COCKAR

JUDGE