



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 102 OF 2012

[Formerly Eldoret Hccc No. 156 of 2002]

SALAWI INVESTMENTS.....PLAINTIFF

VERSUS

GEOFFREY JOSIAH RONO.....DEFENDANT

BY ORIGINAL ACTION

AND

BETWEEN

GEOFFREY JOSIAH RONO.....PLAINTIFF

VERSUS

SALAWI INVESTMENTS LTD.....1ST DEFENDANT

DEPOSIT PROTECTION FUND BOARD (Sued as liquidator of

THABITI FINANCE LTD in liquidation).....2ND DEFENDANT

JUDGMENT

a. Plaintiff's Claim

Salawi Investments (*hereinafter known as the plaintiff*) came to this court in the year 2002 vide Plaintiff against Geoffrey Josiah Kipkemboi Rono (*herein after referred to as the defendant*) claiming that in a public auction held on 22.11.1996 at Kapsabet town, that parcel of the land known as title No. Nandi/Cheptarit/014 was put up for auction by M/s Thabiti Finance Company Ltd, the chargees thereof in exercise of their statutory power of sale through their agents, M/s Watts Enterprises. The plaintiff participated in the auction as one of the bidders and it was actually declared the highest bidder and hence the successful purchaser of the aforementioned land.

The plaintiff paid the entire purchase price thereof and duly complied with all the conditions of the sale of the land whereupon the same was transferred to the plaintiff and it was subsequently registered as the proprietor thereof and the title deed in that respect issued in its name on 15.5.1997.

The plaintiff avers that its efforts to take possession of the suit land turned fruitless as the defendant who has been occupying the same has adamantly refused to vacate despite several notices issued to him requiring that he peacefully delivers vacant possession of the property to the plaintiff. According to the plaintiff, the defendant is devoid of any rights to the property and as such is a trespasser, his interest having been extinguished upon the chargee exercising his statutory power of sale.

The plaintiff's claim is that the defendant be declared a trespasser on the said land and therefore an order of eviction be issued against the defendant and further a permanent injunction be issued against the defendant from trespassing on the parcel of land. The plaintiff further claims mesne profits, costs and interest of the suit.

b. Defence and Counter claim

The defendant filed statement of defence and counterclaim and amended the same several times, the last being amended, amended statement of defence filed on 3.7.2007 pursuant to leave granted on 20.6.2007 wherein the defendant has counterclaimed against the plaintiff, deposit protection fund board sued in its capacity as the liquidator of Thabiti Finance Company Ltd in liquidation, Daniel G. Kariuki, Onesmus Macharia claiming that he was not served with the requisite statutory notice prior to the alleged sale of L. R. No. Nandi/Cheptarit/104 and avers further that the auctioneers never served him with relevant notices.

The defendant claims that the suit property was sold at unconscionably low price far below a fair market value and in total disregard to the first defendant's interest and that this is ancestral family land and the Defendant his wife and children reside in the suit property. He states further that if this illegal acquisition of the suit property by Plaintiff is permitted it shall cause untold suffering and hardship and that the Plaintiff should not be allowed by this Honourable court to benefit unfairly. The plaintiff is a stranger in the suit and should not be entertained by this Honourable court since it is not properly in court.

The defendant believes that the suit against him is misdirected, misconceived and shall at the hearing hereof seek leave of the court to strike out the plaint. That the suit is defective and incompetent and the Defendant/Plaintiff in the counterclaim shall raise a Preliminary objection at the hearing hereof. That demand and notice are of no valid consequence. The Defendant submits to the jurisdiction of this Honorable court.

In the counterclaim, the 1st defendant states that the 2nd Defendant in the counter-claim is a body corporate established under the provisions of the Banking Act Cap 488 of the Laws of Kenya with capacity to sue and be sued in its own name and is hereby sued in its capacity as the liquidator of THABITI FINANCE COMPANY LTD, a limited liability company established under the provisions of the companies Act Cap 486 of the Laws of Kenya and presently in liquidation. The 3rd Defendant and 4th Defendant in this counterclaim are male adults of sound mind and partners in a firm of auctioneers known as Watts Enterprises.

He claims that on or about 22nd day of February 1984, the 1st defendant was advanced by M/S Thabiti Finance Company LTD the sum of Kshs. 400,000/- against the security of land parcel No. Nandi/Cheptarit/104 which parcel was registered in the name of the 1st Defendant.

That upon his said property being charged he did not receive any correspondence and/or notice, statutory or otherwise, from the said Finance Company not from the 3rd Defendant until on or about 11th November, 1996 when he read an advertisement put up in the "East African Standard" of the same date by M/S WATTS ENTERPRISES to the effect that the Defendant's/Plaintiff in the counterclaim land parcel No. Nandi/Cheptarit/104 was to be sold by public auction on 22nd November, 1996 at the main matatu/Bus stage, Kapsabet Town.

He attended main Matatu/Bus Stage, Kapsabet town with a view inter alia of witnessing and bidding at the auction but did not see the third and/or 4th Defendants and/or their representatives and did not witness any auction take place at the site mentioned. That he was utterly shocked when sometimes in the month of May, 1997 he was confronted by a director of the Plaintiff who threatened him with forceful eviction unless he vacated the suit land voluntary on the grounds that the Plaintiff was the registered owner of the same pursuant to "a sale by public auction".

That upon investigations, the Defendant established that the process by which his land parcel No. Nandi/Cheptarit/104 was sold and transferred to the Plaintiff for a paltry sum of Kshs. 500,000/= or thereabouts was fraudulent, null and void which fraud was perpetrated jointly and severally by the Plaintiff, second, third and fourth Defendants and /or their Directors, servants and/or agents.

Particulars of fraud on the part of the plaintiff in the original suit second third and fourth defendants their directors, servants and /or agents are failing to sell the suit land by Public Auction on 22.11.1996; selling/buying the land secretly and at a gross under value ;purporting that a sale had been effected whereby the Plaintiff in the original suit acquired interest in the parcel at an unconscious consideration of Kshs.50,000 whilst in fact no sale and/or auction was effected at which such amount was uttered at as the best available price and/or highest bid; colluding to sell/buy the Defendant's/Plaintiff in the counterclaim land at a gross under-value having regard to the value of the land which at the time stood at Kshs. 20,960,000; selling the Defendant's/Plaintiff in the counterclaim land without any notice to the said Defendant/Plaintiff in the counterclaim whether statutory notice or otherwise; selling the defendant's/plaintiff in the counterclaim land on the purported authority of statutory power of sale whilst such statutory power of sale did not exist and/or had not crystallized; selling the Defendant's/Plaintiff in the counterclaim land when the debt forming the subject matter of the charge was statute- barred and therefore unrecoverable; buying/selling land at conflicting prices; transferring the land without obtaining proper consent from the relevant Land Control Board; irregularly obtaining the consent of the Land Control Board by misrepresentation; selling the land without stating its true value; failing to sell the suit land at public Auction.

The Defendant states that land parcel number Nandi/Cheptarit/104 whose value in 1996 was Kshs. 20,060,000 was sold and purchased fraudulently and unconsciously at a gross under-value of Kshs. 500,000 or thereabouts without any regard to the Defendant 's/Plaintiff in the counterclaim interest as chargor. The Defendant contends that the plaintiff in the original suit was an active player in the said secretive, fraudulent and unconscionable sale and cannot hide under the protection given to bona fide purchasers for value without notice of fraud perpetrated by the chargee.

The Defendant further contends that the sale was null and void as statutory notice under the registered Land Act Cap 300 had not been issued by the 2nd Defendant and/or the finance company. Additionally, the 3rd and 4th Defendants did not serve him with the notices required in law and that as the debt forming the subject matter of the charge arose in 1984, the 2nd Defendant could not purport to sell the charged property in 1997, a period of more than 12 years, as the debt had become statute barred and irrecoverable in the circumstances. In the premises, the purported sale was null and void and equally unenforceable in law.

The Defendant prays for a declaration that the purported sale and transfer of the 1st Defendant Land Parcel No. Nandi/Cheptarit/104 in favour of the Plaintiff in the original suit is null and void. The Defendant further prays for a declaration that the debt forming the subject matter of

the charge over the Plaintiff in the original suit land parcel No. Nandi/Cheptarit/104 is barred by statutory limitation and that the land registrar be directed to cancel the registration of the plaintiff in the original suit as the proprietor land parcel No. Nandi/Cheptarit/104 and the title deed thereof be released to the Defendant/Plaintiff in the counterclaim free of any encumbrances.

The Defendant lastly prays for an order of permanent injunction restraining the Plaintiff in the original suit, the second, third and the fourth Defendants, their servants and/or agents from trespassing, selling, alienating, entering and/ or in any other way dealing with land parcel No. Nandi/Cheptarit/104.

Reasons wherefore, the defendant prays that the plaintiff's suit be dismissed with costs and judgment be entered for the defendant in the counterclaim against the plaintiff in the original suit and the 2nd and 3rd defendants jointly and severally as prayed above.

In reply to amended defence and defence to counterclaim, the plaintiff states that it was not its duty to serve any notices upon the Defendant now the Plaintiff in the counter claim as the Plaintiff now the 1st Defendant in the counter claim was not the chargor of the property known as L. R. No. Nandi/Cheptarit/104.

The Plaintiff avers that it was a purchaser for value without notice of the alleged defects and the law protects its interest accordingly and that it did not sell the property but only bought the same and it was not its duty to determine the price at which the property was to be disposed of. The Plaintiff states that the Defendant in the original action and now the Plaintiff in the counterclaim should pursue the issue of the sale with the lender and the Auctioneer as it was not a party to the arrangement.

The Plaintiff states that the Defendant knew the consequences of failing to redeem the suit property and should not be heard complaining that the suit property is the ancestral family land and that the acquisition of the property is legal and the Defendant is to blame for any sufferings he may find himself in and that the Defendant is proper party in this suit and he is not a stranger in any manner as he was the registered proprietor of the suit property and he is also the person who is currently in occupation and or use of the same.

The Plaintiff, states that the suit is properly before the Honourable court as all the legal requirements have been met before filing the same. That the Plaintiff denies that the Defendant carried out any improvements on the suit property.

The Plaintiff avers that if the defendant carried out any improvements and or renovations and or extensions to the suit property after the date of the public auction vis after 22.11.1996, then the same were done at his own risk and with gross negligence and/or recklessness as the Defendant knew that the ownership of the suit property had legally passed to the Plaintiff.

The Plaintiff denies that the suit property was sold at a price that was manifestly too low and categorically states that it did not sell but only brought the property as the highest bidder at the auction and denies that the transaction was fraudulent.

c. The 2nd, 3rd, 4th defendants defence

The 2nd, 3rd, 4th defendants in their defence state that the necessary leave of Court required to enjoin the liquidator for a company in liquidation was not sought and/or obtained prior to the institution of this suit hence the Court should strike out the suit on a preliminary point. Moreover, that the 1st Defendant is in admission of the financial accommodation granted to him against the security of the property being land parcel No. Nandi/Cheptarit/104 for which the indebtedness is still outstanding and the subject of High Court (Milimani) Civil Case Number 142 of 1999, Deposit Protection Fund Board (suing as Liquidator of Thabiti Finance Company Ltd) —vs- Geoffrey Josiah Kipkemboi Rono.

The Plaintiff herein has obtained judgment and has been making attempts at execution. The 2nd, 3rd & 4th Defendant also state that they are aware that the Plaintiff herein (by way of counterclaim) did institute High Court Civil Case Number 155 of 1994 at Eldoret. The 2nd, 3rd & 4th Defendants therefore aver that on account of the failure by the Plaintiff (in the counterclaim) to disclose these previous suits before Court has offended the provisions of the Civil Procedure Rules and has come to Court with unclean hands.

The Defendants herein deny that they failed to avail letters or statutory notices to the First Defendant and state that the 1st Defendant was all along notified of the status of his account and all the necessary statutory notices prior to realization by way of a public auction were issued.

The Defendants state that the auction was properly conducted on the 22nd November, 1996 at which auction the Plaintiff (in the original auction) emerged the highest bidder. The Defendants state that this was the fifth attempt at selling the property the first four having failed.

The 2nd, 3rd and 4th Defendants state that indeed there was an auction on 22nd November, 1996 and deny that the land was sold secretly or at a gross undervalue. They deny that the consideration for the sale was Kshs.50,000 and state that it was sold at the highest bidder at Kshs. 500,000 which was the best price obtainable in the circumstances. Further they deny any collusion and further that the property was valued at Kshs. 20,960,000 and put the Defendant to strict proof.

The 2nd, 3rd & 4th Defendants deny that the value of the land in 1996 was Kshs.20,060,000 and challenges the 1st Defendant to offer credible and real proof thereof. Further it is denied that there was any fraud involved or that the sale price of Kshs. 500,000 was an undervalue or unconscionable or without regard to the Defendant's interest as Chargor. The 2nd, 3rd & 4th Defendants deny the allegations of secrecy, fraud and unconscionability leveled therein and put the Defendant to strict proof.

The 2nd, 3rd & 4th Defendants state that the requisite notices were properly issued and the Chargees statutory power of sale had arisen and was properly exercised and that the property having been sold and transferred to a third party for valuable consideration the Defendant is not

entitled to the declaration sought. The jurisdiction of the Court is not properly invoked therefore is not admitted.

That the 2nd, 3rd & 4th Defendants state that in so far as the 1st Defendant has failed to show that the debt the subject of the monies advanced against the security of his property has been fully paid, this suit by way of counterclaim is bad in law and lacks merit and should be dismissed with costs to the 2nd, 3rd & 4th Defendants

When the matter came up for hearing, **PW1, Mr. Wilfred Kipkorir Sang** testified that he stays in Nairobi and deals in motor vehicles. He is a director and shareholder of the plaintiff company that was incorporated on 22.3.1991. He has the memorandum and Articles of Association and that the last page of the Articles shows that he is a director and shareholder. The company bought land registration No. Nandi/Cheptarit/104 after seeing the advertisement in the Newspaper. It was in the Daily Nation, Taifa Leo and East Africa Standard. He produced a copy of the East Africa Standard dated 11.11.1996. The advert was placed by Auctioneers known as Watts Auctioneers.

He attended an auction on 22.11.1996 held near Kapsabet bus station with 3 to 4 other bidders. The highest bid was by the plaintiff who bid KShs.500,000. The company was declared the highest bidder. The auctioneer advised him to get in touch later as they were going to make consultation.

On the 9.1.1997, the Auctioneer communicated to him that the bid had been accepted and was to deposit 25% of the amount. He had a certified copy of the letter from Auctioneer and that he was to pay KShs. 125,000 being 25% of deposit. He paid by way of banker's cheque, Kenya Commercial Bank, Moi Avenue. He was issued with a receipt. He lost the receipt but he has a copy of the receipt from Auctioneer.

The plaintiff paid the balance thus KShs. 375,000 on 16.6.1997 by banker's cheque. He produced a certified copy of the receipt as PEx.6. When he paid the 25%, he was issued with a memorandum of sale which he produced as Pex.7. There was a consent of the Land Control Board. The application was done by the Deposit Protection Fund as transferee and the plaintiff as the buyer. This was because Thabiti Finance had been put under receivership. The application for consent was lodged on 22.4.1997. He had a duplicate copy which was produced as P.Ex.8. He was issued with the consent on 15.5.1997. He had a copy of the consent as the original was taken by the office. He was issued with a transfer by chargee in exercise power of sale. It is executed by both plaintiff and Deposit Protection Fund. He lodged the documents with the Registrar of Lands and issued with title in the name of Salawi Enterprise Company. He did a search dated 20.5.1997. He produced it as P.Ex.12. The plaintiff has not yet taken possession. The premises' owner refused to vacate after notice and has remained on the land to date where he grows maize, keeps cattle and has grown trees on the property measuring 40 acres. The property is about 1 kilometre before Mosoriot. He does not benefit from the property. The company has not benefited from the property. He prays for eviction and mesne profits and costs. Government Land Valuer assigned a value of KShs. 400,000 on the land. He bought the land for KShs.500,000. He prays for the dismissal of counterclaim.

On cross examination by Mr. Aseo learned counsel for the defendant, he states that he paid KShs. 500,000. The transfer was signed by Thabiti Finance Limited and precisely Cherwon. It is also signed by himself on behalf of the company. The value is indicated as KShs.400,000. The document was signed on 5.5.1997. The applicant for consent is Salawi Investments Company. The application does not have the name of Thabiti. It has Geoffrey Josiah Rono. Nothing in the consent indicates that the land had been charged. Cherwon was the Director of Deposit Protection Fund. He was not director, Thabiti Finance Limited. Thabiti Finance was under statutory manager. A deposit of 25% was to be paid at the fall of the hammer.

The transfer was signed on 15.5.1997. His application was 5.5.1997 and the title deed was issued on the same date, thus 15.5.1997. He signed after he had paid.

On cross examination by Mr. Kariuki, he states that he was dealing with the auctioneer. Cherwon was the statutory manager for Thabiti Finance Company Limited. He paid the first purchase price to the Auctioneer. The second amount was paid to the statutory manager, Thabiti Finance. He has attempted to take over the property. He has gone there physically. He wanted to use the land.

And **on re-examination by Mr. Manani learned counsel for the plaintiff**, he states that he requested them to vacate but they refused. The Auctioneers did not allow him to pay at the fall of the hammer. On 9.1.1997, the Auctioneer wrote to indicate that his bid had been accepted. He paid on the same date. The value of the property was KShs.400,000 but he paid KShs.500,000. The transfer by chargee was prepared on 5.5.1997. The consent was granted on 15.5.1997. That was the close of the plaintiff's case.

Geoffrey Josiah Kipkemboi Rono, DW1 stated that he is the Defendant in the present suit, and plaintiff in the counterclaim in therefore conversant with all the facts giving rise to this suit. That he is the legal owner of land parcel number NANDI/CHEPTARIT/104 measuring approximately 40 acres. He resides on the suit land with his family. The suit parcel of land is agricultural land situated within Kapsabet in the Republic of Kenya.

That on or about the 22nd February 1984, he needed financial assistance for purposes of purchasing a lorry to be used in the farm. With this need, he approached THABITI FINANCE COMPANY which agreed to advance to him the sum of KShs.400,000 which was secured against the security of land parcel NANDI/CHEPTARIT/104. The parcel of land was therefore charged to the said financial institution. He also offered a lorry registration number KUS 996 as security for the loan advanced. According to the charge instrument, the amount/loan advanced was to attract an interest rate of 16% per annum and in case of default a penalty of 3% on the loan amount is chargeable.

That he started to repay the loan on a monthly basis. However, he was not able to settle the loan amount in full in the eighteen (18) months period he had been given by the financial institution. The amount therefore attracted interest rates and also penalties for default. Even with this turn of events, he kept communication with the bank with a view of settling the outstanding amount. In the early 90s, Thabiti Finance Company was placed under liquidation. During this time, he made a proposal to settle the amount.

That on or about the 11th November 1996, he was utterly shocked to read an advertisement in the EAST AFRICAN STANDARD by M/S WATTS ENTERPRISES to the effect that land parcel No. NANDI/CHEPTARIT/104 would be sold by public auction on 22nd November

1996 at the Kapsabet Bus Terminus/stage. This was shocking because he was not at any time served with any notification of sale regarding the parcel of land charged to Thabiti Finance Company which was at that time in liquidation.

That in reaction to the advert, on the 22nd November 1996, he attended the venue of the public auction with a view of witnessing and also bidding at the auction. However, on arrival, he did not find anyone and accordingly did not witness any auction taking place. Upon investigations, he later learned that the parcel of land had been sold to SALAWI INVESTMENTS, the plaintiff in the original/suit and one of the defendants in his counterclaim for a paltry sum of Kshs.500,000/=. His efforts to track down M/s Watts Enterprises and Salawi Investments were futile.

That in the year 1997, he carried out a search to establish ownership of the suit property and what he found out shocked him as well. The property had been registered in the name of Salawi Investments. This was shocking because he is aware of his own personal knowledge that the land, the subject of this suit being agricultural land, it was a legal requirement to first seek the consent of the Land Control Board before effecting any transfer. He is also aware that the parties to a transaction respecting agricultural land must lodge an application to the relevant Land Control Board. This was not done and therefore rendering the entire process illegal. This is because his own name was used in the application for consent of the Land Control Board and even in the consent itself which accordingly amounted to misrepresentation. Further, the amount stated in the application for consent as being the value of the property is a sum of Kshs. 400,000/=, which reveals that the land was not sold for Kshs. 500,000/= as earlier stated.

That this new turn of events prompted him to instruct his advocates to lodge a claim against the Defendants for the reasons that no statutory notices were ever issued to me and therefore the alleged sale by public auction is null and void and that the mandatory consent of the Land Control Board was acquired fraudulently by misrepresentation. The land parcel was sold at a gross undervalue. He is praying that this Honourable Court adjudicates on all the issues and rule against the Defendants.

On cross examination by M/s Adhiambo, he states that he paid up the loan. It was for Kshs.400,000. He does not have the statements. When Thabiti sold the land, he had settled the loan. He settled the loan but they took back the lorry. He had given the land as security. He knew that it was his matrimonial property. He knew the consequences of taking security. He knew that the land would be sold for nonpayment. However, he paid the loan, the land was sold fraudulently. The plaintiff did not issue any statutory notice.

He further states on cross examination that the value of selling the land is given by the bank. The plaintiff did not set down the value of the land. The loan is between him and the bank. The value of the land was over Kshs.280,000,000 however, he does not have a valuation report. The report was done when Salawi came to evict him. The valuation was done secretly. The report dated 22.12.2002. It shows the property is Kshs.20,000,000. The property was sold at Kshs.400,000 per acre. It was advertised that the sale would be 22.11.1996. He went to the bus stage and found no auction. He was there with some witnesses.

He saw the advertisement. He went to Thabiti but they did not want to tell him. They were trying to give Salawi Investments time to forge the title deeds. They did not want to show him how the sale was done in Nairobi. He is still on that land. He made no attempt to resale the land. The title is in the name of Salawi Investment.

He was given a lorry and not money. He was given a lorry worth shs.400,000. They took back the lorry and he lost his money. There is another letter that shows that the property was sold for Kshs.400,000. The memorandum of sale shows the price as Kshs. 500,000.

DW2, Peter Kitonyo states that on 30th July 1983 vide loan application forms, Geoffrey K. Rono, the defendant in the original suit and the Plaintiff in the Counterclaim applied for a loan of Kshs. 850,000/= from Thabiti Finance Company Limited. On 5th August 1983, the Bank offered the Plaintiff the sum of Kshs. 400,000/- upon terms and conditions set out in the letter of offer dated 5th August 1983. Among the terms and conditions were that the advance amount was Kshs.400,000/-and that the interest rate was 16% p.a. subject to adjustments. Penalty interest of 3% p.m. on any instalments falling in arrears for more than 14 days. Security for the advance was charged over Land Title No. Nandi/Cheptarit/104 i.n.o. Geoffrey Josiah Kipkemboi Rono.

The Plaintiff signed the letter of offer on 8th August 1983 signifying his acceptance of the terms and conditions in the letter of offer.

The sum of Kshs. 400,000/= was disbursed to the Plaintiff and a Charge over his land Title Number Nandi/Cheptarit/104 was registered. The Charge is dated 22nd February 1984. As per the Charge, the sum secured was Kshs.400,000/= plus interest at the rate of 16% p.a. or at such as the Bank could as from time to time decide. The Bank could vary the rate of interest without prior consultation with the Plaintiff. There was also a provision for penalty interest at the rate of 3% p.a. for any monthly repayment remaining in arrears. The security created was continuing security.

The Plaintiff defaulted in its repayment of the loan, after a number of demands by the Bank the matter was placed with the Bank's Advocates for recovery purposes. The suit property was finally sold in an auction held on 22nd November 1996.

The Plaintiff sued the Bank in the year 1992 in HCCC No. 6784 of 1992: Plaintiff vs: The Bank, to stop the auction sale scheduled for 22nd December 1992. The suit was settled in 1994 vide a consent dated 16th February 1994 whereby the Bank agreed to stop the auction sale slated for 18th February 1994.

Further, the Plaintiff filed Eldoret HCCC No.155 of 1994 against the Bank which to date has not been heard and determined.

On 19th December 1994, the Bank was placed under the Liquidator thus the Deposit Protection Fund, the Defendant in the Counterclaim. As such, the 2nd Defendant has been wrongly sued as it had no dealings with the Plaintiff and is only a Liquidator. The proper party to sue is Thabiti Finance Company Limited (In Liquidation). Further, the Plaintiff is required by the law to seek leave to sue the said company.

Before the sale of the suit property on 22nd November 1996 the Plaintiff was served with a statutory notice, a notification of sale, a redemption notice and the date of auction was advertised two times in the daily newspaper. Similarly, before the transfer was done, the Kapsabet Land Control Board granted consent to transfer the suit property to Salawi Investments Company Limited. The suit property was valued by Kinyua Koech Limited.

There was no fraud in the way the suit property was sold. The amount realized did not clear the outstanding debt and as at 28th February 2009, the outstanding balance was Kshs. 12,732,761.75.

In the year 1999, the Bank through the Liquidator and with the leave of the Court sued the Plaintiff in Nairobi HCCC No. 142 of 1999 where judgment was obtained for the sum of Kshs. 4,712,927.30 plus interest at the rate of 18% p.a. and a Decree issued to that effect. This Decree remains unsatisfied to date as efforts to execute were frustrated by the Plaintiff. In the circumstances, the Plaintiffs suit should be dismissed with costs to all the Defendants.

ANALYSIS AND DETERMINATION

The parties filed submissions which I have considered with the pleadings and evidence and do find that on the 30.7.1983, Geoffrey K. Rono, 37 years old then and of P. O. Box 401, Kapsabet, a farmer cum-businessman by profession applied for a loan from Thabiti Finance Company Ltd. He applied for Kshs. 850,000 that was to be repaid within a period of 24 months. The purpose of the loan was to buy a new Isuzu lorry and farm development. The available security was real property being Nandi/Cheptarit/104 valued at Kshs. 1 Million.

This property is situated between Eldoret and Kapsabet on the main road. The Executive Director, Thabiti Finance Company Limited wrote to the defendant communicating the offer of advance of Kshs. 400,000. The offer was based on the following terms;

- “1. That you will establish a fixed deposit savings account with us in an amount of at least Kshs. 10,000 for the period of the loan.**
- 2. That the advance amount will be Kshs. 400,000 (Four Hundred Thousand) subject to verification and approval by our Advocates of the Security you offer.**
- 3. That the period is 18 months.**
- 4. That the repayment shall be Kshs. 27,556 (Twenty-Seven Thousand Five Five Six) per month which includes financial charges at the rate of 16% per annum subject to adjustments as may be directed by the Kenya Monetary Authorities.**
- 5. That a penalty of 3% per month shall be charged on any instalments that fall in arrears more than 14 days.**
- 6. That the security you will initially make available will be over your new vehicle and a legal charge over property No. NANDI/CHEPTARIT/104.**
- 7. That you agree to be liable and will pay on demand all the legal costs to our Advocates on their acceptance and execution of our instructions on this matter.**
- 8. That the amount of advance will be released after receipt by us of the instrument of security appropriately registered. The company however reserves the right to charge interest from the date of acceptance of this offer.**
- 9. That the security instrument shall be prepared by the company’s advocates and shall contain such terms and conditions as the company deems fit.**
- 10. That you agree to arrange appropriate comprehensive insurance of the property offered as security and have our interest noted thereon. The renewal of the insurance shall be channeled through us and should be paid promptly, failure to which we shall renew the insurance automatically at your own cost and charge you any other penalties arising therefrom.”**

Title Number Nandi/Cheptarit/104 was charged as security for the loan advanced. The charge was registered on 16.3.1984. The 1st defendant defaulted and notice for recovery was issued on 25.4.1992 to the provided address of 401, Eldoret. A second notice was issued on 1.7.1992. Unfortunately, on the 19.12.1994, the Governor, Central Bank of Kenya exercising powers conferred upon him under the provisions of section 35(1) of the Banking Act, the Central Bank of Kenya appointed the Deposit Protection Fund board to be the liquidator of Thabiti Finance Company Limited a financial institution previously licensed under the Banking Act to carry on business as a financial institution. The bank in the discharge of its supervisory functions had determined that the institution was insolvent.

The Board’s mandate as liquidator was to be governed by the provisions of the Banking Act and the regulations thereunder as well as the pertinent provisions of the Companies Act. In this regard, they were required to take into custody all the assets books and common seal of the institution. Recover any sums or property owed to the institution. Realize all assets owned by the institution. Trace assets acquired by any officer or any other person using the institution’s funds. Determine and settle the list of creditors/depositors and debtors. Ascertain suits filed against the institution and prepare a report to be filed in court. Pay dividends to creditors if they were to realize adequate funds for the purpose.

In the discharge of their responsibilities as liquidator, they were subject to the jurisdiction of the High Court as provided in Section 35(6) of the Banking Act.

The evidence adduced confirms that the defendant in the original suit was owing the 2nd defendant in the counter claim Kshs.12,732,761 when the property was sold.

This court finds that the defendant defaulted in paying the loan and the plaintiff was an innocent purchaser for value having been the highest bidder in the auction conducted by the Auctioneers known as Watts Auctioneers. It is trite that a person who buys property in a forced sale and who has had the same successfully transferred to him; and against whom not iota of evidence is presented of illegality, fraud, collusion or corruption cannot be curtailed in the enjoyment of his proprietary rights. There is no evidence of fraud against the plaintiff.

In **Kaplan Shashikant Jai & Another v Eco Bank Kenya Ltd & Another** (2015) eKLR, Gikonyo, J opines with regards to Section 99 of the Land Act (**and I do agree**) as follows;

“The law as it stands is that only fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive knowledge will impeach a sale to a purchaser for value of the charged property. Similarly, I should think that, for an injunction to issue against such purchaser, a prima facie case must be made out based on one or more of the elements in Section 99, to wit, fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive knowledge.”

Section 26(1) of the Land Registration Act provides that 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 illegal, unprocedurally or through a corrupt scheme.

This court finds that the plaintiff holds a certificate of titles, purchased the property in good faith and had no notice of fraud if any. The bank had a valid charge on the property.

The claim that the Suitland is matrimonial property even if true does not assist the defendant. In **JOSEPH GITAI GACHAU vs. PIONEER HOLDINGS** [2009] eKLR; it was observed

“However, we recognize the argument put forward by the applicants that the suit property is a matrimonial home in which they occupy in their now sunset years. But we would like to point out that couples such as the one now before us must realize that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all and sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however great, per se, would operate against the exercise of statutory power of sale by the mortgage.”

In view of the provision of section 99 of Land Registered Act, the 1st defendant is not entitled to the prayer of cancellation of registration as there is no evidence of fraud.

In conclusion, the plaintiff succeeds in terms of an order that that the defendant be and is hereby declared **a trespasser on the said land** and therefore an **order of eviction be and is hereby issued save that the same be effected upon the defendant being issued a 45 days' notice.** against the defendant and further a permanent **injunction be and is hereby issued** against the defendant from trespassing on the parcel of land. The counterclaim is dismissed. Costs to the plaintiff. Orders accordingly.

Dated and delivered at Eldoret this 31st of January, 2019.

A. OMBWAYO

JUDGE