



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 121 OF 2014**

**DANIEL GACHOKI MUCHIRA.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....1<sup>ST</sup> DEFENDANT**

**VIEWLINE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**TERESIA NYAMBURA MUTHEE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

In a plaint dated 12<sup>th</sup> May 2014, the plaintiff sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants for the following orders:

*(a) That a declaration that the sale by public auction intended to be conducted on 15<sup>th</sup> May 2015 of all that piece of land known as KIRINYAGA/GATHIGIRIRI/217 is an illegality, null and void for failure to give the mandatory statutory notice and/or for being tainted with fraud and illegalities.*

*(b) That the 1<sup>st</sup> defendant do provide an account to the Honourable Court, and consequently thereto the property known as KIRINYAGA/GATHIGIRIRI/ 217 be discharged forthwith.*

*(c) That an injunction permanently restraining the defendants by themselves, agent and/or servants from interfering and or making any dealings on land parcel No. KIRINYAGA/GATHIGIRIRI/217 and the public auction as intended be declared null and void.*

*(d) Costs of the suit.*

The suit was filed contemporaneously with a Chambers Summons application under certificate of urgency dated the same day. Upon placing the same before the duty Judge, the Court certified the application urgent and granted temporary orders pending the interparties hearing on 29<sup>th</sup> May 2014.

On 25<sup>th</sup> July 2014, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a joint statement of defence denying the plaintiff's claim and sought to have the suit dismissed with costs. In a Notice of Motion dated 15<sup>th</sup> August 2015, the plaintiff sought to enjoin the 3<sup>rd</sup> defendant as a party which was subsequently allowed. On 10<sup>th</sup> November 2015, the 3<sup>rd</sup> defendant filed defence and counter-claim to the plaintiff's claim. She denied the plaintiff's claim and averred that she became aware of an advertisement for the sale of the suit property L.R. No. KIRINYAGA/GATHIGIRIRI/217 which was to be conducted by public auction on 22<sup>nd</sup> April 2014. She averred that the public auction was to be conducted on 15<sup>th</sup> May 2014.

**PLAINTIFF'S CASE**

The plaintiff testified on oath and adopted his witness statement recorded on 12<sup>th</sup> May 2014. The plaintiff stated that they took a loan as a group and he gave title to his property as collateral/security. He asked the 1<sup>st</sup> defendant for accounts. He wanted to know how much the 1<sup>st</sup> defendant was paid from realizing the sale of other properties which had also been given as security. He stated that when he filed this suit, he also filed an application to stop the intended auction which was to be conducted on 15<sup>th</sup> May 2014. He was granted temporary stay for sale. However, the public auction proceeded despite the orders and the suit property was sold to the 3<sup>rd</sup> defendant. On cross-examination, the plaintiff stated that he was issued with the injunction order on 15<sup>th</sup> May 2014 and he served the 1<sup>st</sup> defendant on 16<sup>th</sup> May 2014. He admitted in cross-examination that he gave the title to the suit property as security to secure a loan. He said that he guaranteed the loan from the 1<sup>st</sup> defendant which was 1.9 million. He stated that after they were given the loan, they made payments and were issued receipts.

However, he could not explain how long they were to re-pay the loan. The plaintiff said that he filed another case being SPMCCC No. 62/2013 (Kerugoya). He was also seeking to stop the sale of the suit property by public auction. When the application was dismissed, he filed the instant suit. He admitted that he was served with documents by the 1<sup>st</sup> defendant that they wanted to sell the suit property. He also admitted that the 2<sup>nd</sup> defendant also served him with documents of sale. He did not make any payments. He also admitted that he received documents from the auctioneer (2<sup>nd</sup> defendant) indicating that there was going to be a public auction of the suit property on 15<sup>th</sup> May 2014. Despite all these documents, he did not make a single payment. The plaintiff further stated that he signed documents for the loan as a guarantor which are contained in the 1<sup>st</sup> defendant's list of documents.

#### 1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANT'S CASE

The 1<sup>st</sup> defendant called one witness namely Kipkurui Cheburet who works as the Branch Manager based at Kerugoya. He testified on oath and was referred to his list of documents filed the same date items No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 & 13 which he also produced in evidence.

On cross-examination, the witness stated that the plaintiff approached the 1<sup>st</sup> defendant Corporation with a view of taking a loan. He was granted a loan of Ksh. 1.9 million and signed the loan documents. He registered a charge over his property. However, the plaintiff defaulted in repayment of the loan. He confirmed having issued the mandatory statutory Notice but the plaintiff did not redeem the property. On 15<sup>th</sup> May 2014, the security was realized to secure the loan through a public auction. They were not paid any money and no order was served upon them to stop the auction. The sale was successful. It was bought by the 3<sup>rd</sup> defendant after she was declared the highest bidder at a purchase price of Ksh. 1.3 million. He stated that the auction was conducted in accordance with the law. She was issued with a certificate of sale.

On cross-examination, the witness stated that the collateral securities given for the loan were three. He said that the suit property is one of the securities which has been realized through a public auction on 15<sup>th</sup> May 2014 at a price of Ksh. 1.3 million. He stated that the other securities have also been sold but could not state how much was realized from each of them. He stated that as at 31<sup>st</sup> December 2012, the outstanding loan was Ksh. 2,970,032/=.

#### 3<sup>RD</sup> DEFENDANT'S CASE

The 3<sup>rd</sup> defendant was also referred to her statement dated 10<sup>th</sup> November 2015 which she adopted in her evidence. She was also shown her defence and counter-claim which she sought judgment against the plaintiff as contained in her counter-claim. She stated that she bought the suit property from a public auction on 15<sup>th</sup> May 2014 at a price of Ksh. 1.3 million. She paid the entire purchase price. She was issued with all the legal documents including certificate of sale and receipt. She wants the plaintiff evicted from his land and a permanent injunction to issue. She also seeks costs of this suit.

On cross-examination, she said that she saw the advertisement in the newspapers that there was going to be a public auction on 15<sup>th</sup> May 2014. She stated that she attended the auction and bit for the purchase of the land at Ksh. 1.3 million. Thereafter, she was declared the highest bidder. She paid in full and was issued with a certificate of sale. She has not been able to transfer the property into her name as there is a caution placed on the property. She has not also taken possession as the original owner is still occupying the property.

#### ISSUES FOR DETERMINATION

The issues for determination as can be discerned from the pleadings are as follows:

- (1) Whether the public auction on 15<sup>th</sup> May 2014 was conducted legally and procedurally.*
- (2) Whether the plaintiff was indebted to the 1<sup>st</sup> defendant.*
- (3) Whether the 3<sup>rd</sup> defendant was an innocent purchaser for value without notice and obtained a good title.*
- (4) Whether the plaintiff has proved any allegations of fraud, illegality or non-compliance of Statutory Notice was proved against the defendant.*
- (5) Who shall pay the costs of this suit?*

#### ANALYSIS AND DETERMINATION

I have carefully considered the pleadings and the proceedings giving rise to this suit. I have also considered the evidence adduced by the parties and the exhibits produced in support of the respective positions. I now proceed to analyze the issues raised as follows:

#### **(1) Whether the public auction conducted on 15<sup>th</sup> May 2014 was tainted with procedural illegality.**

*Section 90 of the Land Act Cap 280 (Laws of Kenya)* provides as follows:

- “1. If a charger is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under*

any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

2. The Notice required by Section (1) shall adequately inform the recipient of the following matters:

(a) The nature and extent of the default by the chargor;

(b) If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) If the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;

(d) The consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) The right of the charger in respect of certain remedies to apply to the Court for relief against those remedies”.

Upon perusal of the exhibits produced by the 1<sup>st</sup> defendant, the chargor was served with notice pursuant to **Section 90 (1) of the Land Act**. The plaintiff in cross-examination also admitted having been served with the same documents. The notice issued by the 1<sup>st</sup> defendant dated 10<sup>th</sup> September 2008 was explicit on the obligation required of the chargor on the outstanding amount at Ksh. 2,178,300 as at 01/10/2008. When the 2<sup>nd</sup> defendant issued the 45 days Redemption Notice on 11<sup>th</sup> December 2012, the outstanding balance was given as Ksh. 2,790,032. The plaintiff admitted having been served with the same by the Auctioneer. The plaintiff had even filed another case before the lower Court vide PMCC No. 204 of 2010 (Kirinya) which proceeded to the appellate Court but he lost it. I am therefore satisfied that from his own admission, during cross-examination that plaintiff was duly served with the Statutory Notices **under Section 90 of the Land Act** requiring his performance of the obligation regarding the loan he secured using title deed to the suit property.

I also note that Court order issued by Hon. Justice A. Ombwayo in Nyeri on 15<sup>th</sup> May 2014 was not served upon the defendants during the auction date on the said 15<sup>th</sup> May 2014. As such, the public auction conducted on the said 15<sup>th</sup> May 2014 was done lawfully and legally within the confines of the law.

**(2) Whether the plaintiff was indebted to the 1<sup>st</sup> defendant.**

The plaintiff in the plaint admitted that the repayment of the loan was not made as per the agreement with the 1<sup>st</sup> defendant but the loan was subsequently paid in full upon realization of some of the securities together with the members contributions. However, the plaintiff has not given evidence of payments made or the amount realized from any other security. The plaintiff acknowledged receipt of documents served but has not contested the outstanding claim contained in the notices issued by the 1<sup>st</sup> defendant. I find and hold that the demand notice and the statutory notices were clear indication that the plaintiff was indebted to the 1<sup>st</sup> defendant.

**(3) Whether the 3<sup>rd</sup> defendant was an innocent purchaser for value without notice and obtained a good title.**

The law on the sale of a security in the exercise of a statutory power of sale by a chargee is now settled. In the case of **Joyce Wairimu Karanja Vs James Mburu Ngure & 3 others (2018) e K.L.R.**, the Court held as follows:

***“In my view, there is little reason to belabour the point. Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser of an auction conducted in the exercise of the statutory power of sale is immunized from suit under Section 99 of the Land Act. Thirdly, a mortgagor’s equity of redemption is extinguished upon the fall of the hammer in a public auction. Fourthly, there is no requirement in law or equity that a mortgagor re-issues the statutory notice if a planned auction is temporarily stopped by the Court and then permitted to proceed through the lifting of the temporary orders”.***

Again in **Simon Njoroge Mburu Vs Consolidated Bank of Kenya Ltd (2014) e K.L.R.**, Justice J.B. Haverlock had this to say about **Section 99** and the position of a purchaser:

***“That Section (99) now statutorily encompasses the right of the chargor prejudiced by unauthorized improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the plaintiff’s remedy lies in this case. In this regard, the plaintiff would do well to note the powers of the Court in respect of remedies and reliefs sought out in under Section 104 of the Land Act, 2012 .....***

***What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages”.***

I am persuaded by the findings of the learned Judges in the above decisions.

**(4) Whether the plaintiff has pleaded and proved any allegations of fraud, irregularity or illegality in the exercise of its statutory power of sale by the 1<sup>st</sup> defendant.**

The plaintiff did not plead nor prove any fraud, illegality or irregularity in the process leading to the exercise of its statutory power of sale by the 1<sup>st</sup> defendant. It was incumbent upon the plaintiff not only to plead but also prove allegations of fraud to the required standard. In **R.G. Patel Vs Lalji Makanji (1957) E.A 314**, the Court held as follows:

***“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.***

**(5) Who will bear the costs of this case?**

Costs is a discretionary matter but in most cases, costs usually follow the event. Having analyzed the issues as shown above, I find that this case has not been proved on the required standard. The same therefore fails and is hereby dismissed with costs. I allow the 3<sup>rd</sup> defendant’s counter-claim as prayed with costs. It is so ordered.

***READ, DELIVERED and SIGNED in open Court at Kerugoya this 20<sup>th</sup> day of September 2019.***

**E.C. CHERONO**

**JUDGE**

**20<sup>TH</sup> SEPTEMBER, 2019**

*In the presence of:*

1. Mr. Maina Kagio holding brief for Mr. Kahiga for 3<sup>rd</sup> Defendant
2. Plaintiff – present
3. Mbogo – Court clerk – present