



REPUBLIC OF KENYA

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

ELC CIVIL CASE NO. 440 OF 2017

(Consolidated with 226 OF 2015)

MOSES MBUGUA MEHTAPLAINTIFF

= VERSUS =

KENYA COMMERCIAL BANK LTD 1ST DEFENDANT

FAIZA ABDALLAH SALID AL ARMY.....2ND DEFENDANT

WARDA A. SAID AL ARMY 3RD DEFENDANT

WATTS AUCTIONEER4TH DEFENDANT

THE COMMISSIONER OF LANDS5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

J U D G E M E N T

1. Moses Mbugua Mehta filed the suit numbered as Environment and Land Court Case No. 5 of 2014 in Nairobi on 7th January 2014 against one defendant – Kenya Commercial Bank Limited. The suit was subsequently transferred to Mombasa Environment and Land Court and given the number 440 of 2017. The plaint was subsequently amended on 1st July 2015 to include 2 – 6th defendants. In the amended plaint, the plaintiff has prayed for judgment against the defendants jointly and severally for:

a. An injunction restraining the 2nd and 3rd defendants their servants, agents, employees or whomsoever from transferring the plaintiff's property known as L.R. No. MN/1/14414 (cr. 42081) SHANZU to a third party.

b. An urgent mandatory injunction. Pending hearing and determination of this suit the court be pleased to grant a temporary injunction against all the defendants whether by themselves, or through, their officers, servants or agents or otherwise whomsoever from, transferring, seizing, taking into their possession, interfering with the plaintiff's property known as L.R. No. MN/1/14414 (C.R. 42081) SHANZU – MOMBASA.

c. That this Honourable Court be pleased to declare the sale of the suit property known as L.R. No. MN/1/14414 (C.R. 42081) SHANZU – MOMBASA. On 20th December 2013 as unlawful and illegal and the sale be set aside.

(cc) An order do issued against the 5th defendant to reconvey/transfer the property known as L.R. No. MN/1/14414 (C.R. 42081) SHANZU – MOMBASA back to the plaintiff Moses Mbugua Mehta.

d. Costs of this suit.

e. Such further or other as this Honourable Court may deem fit and just the grant.

2. The 2nd and 3rd defendants had filed a suit against the plaintiff on 14th September 2015 vide Mombasa ELC No. 226 of 2015. This plaint was also amended and the amended plaint filed on 10th February 2017. In the amended plaint, the plaintiffs (2nd & 3rd defendants) sought judgment against the defendant (plaintiff) in 440/2017 in the following terms:

i. A permanent injunction restraining the defendant, his agents, servants or employees whomsoever from entering, trespassing, harassing or in any other manner interfering with the plaintiffs right of ownership and interest over the plaintiff's property known as L.R. No. 14414 (Originating Number 11179/9) Section 1 Mainland North.

ii. A mandatory injunction commanding and ordering the defendant to vacate and be evicted from plaintiff's property known as L.R. No. 14414 (Originating Number 11179/9) Section 1 Mainland North.

iii. Mense profits accrued from the date of transfer till vacant possession and general damages for trespass upon the plaintiff's property being L.R. No. 14414 (Originating Number 11179/9) Section 1 Mainland North.

iv. Costs of this suit.

v. Such further or other relief this Honourable Court may deem just and fit to grant.

3. The two suits were consolidated and heard together with ELC Case No. 440 of 2017 operating as the lead file hence the plaintiffs in 226 of 2015 became the 2nd & 3rd defendants.

4. The plaintiff called two witnesses in support of his case. The plaintiff testified as **PW1**. He works as a pilot and hotelier. He filed two witnesses' statements which he adopted as his evidence. **PW1** stated that on 23rd October 2009 he borrowed a sum of Kenya Shillings Eight Million Five Hundred Thousand (Kshs.8.5m) from the 1st defendant to purchase a house in Shanzu which was indeed bought. **PW1** continued that the 1st defendant later sold this house on 20th December 2013 through public auction. That at the time of the auction, he was not in arrears of the due monthly instalments as supported by his documents in the list dated 7/1/2014. **PW1** also stated that he was never served with the requisite statutory notice. That the notice exhibited by the 1st defendant in their list of documents filed on 4th December 2018 shows the letter was sent to postal address No. 1582 – Nairobi.

5. **PW1** said although this was his address, he never received this letter. He proceeded to identify his name and that of his wife in the certificate of postage exhibited by the 1st defendant but said the letters never reached them. **PW1** continued that he was also not served with a notification of sale from the auctioneer. That the suit property was registered in the purchaser's names on 13th January 2014 and later transferred to the 2nd and 3rd defendants' names in July of 2014 during the pendency of this case. **PW1** contends that prior to the sale, no valuer visited the suit premises to carry out the valuation as he is always in possession. He said that he is able to pay the amount being demanded by the bank and urged the court to set aside the auction.

6. The witness was put to cross-examination by Mr. Jengo learned counsel for the 1st defendant. He was referred to **PW2**'s statement where **PW1** had told her that he was in arrears of Kshs.1.2million but he was able to raise Kshs.1 million. That the monthly statements showed he did not pay the instalments on time. For instance the period between 20th April – 20th September 2013. **PW1** admitted that his name as well as the address was properly captured in the certificate of posting. That he is the one who had provided the address to the 1st defendant. That he did not have a letter from the postmaster saying the letter never went through them. That this suit was filed after the sale.

7. In cross-examination by Mwakireti counsel for 2nd & 3rd defendants **PW1** said that on 20th January – 20th March he never made payments but he was in constant touch with the bank. That between 20th April – 20th September 2013, he had not made any payments. That he had read the charge document before signing it. That because of the default, the bank had every right to sell. That the suit filed in Nairobi on 7/1/2014 was only against the bank (1st defendant). **PW1** admitted the property was advertised as shown in page 38 of the defendants' documents. That he had no letter from the bank agreeing to stop the sale. In re-examination, **PW1** stated he knew the property was for sale when he saw the advertisement. What he did was to raise the money and paid Kshs.1million on 17/12/2013. **PW1** admitted he was in arrears. That he became aware the property had been transferred in January after the filing of the suit.

8. Elizabeth Mwhaki Kariuki testified as **PW2**. She is a business woman and wife of the plaintiff. That she first learnt there was a problem with the house on 7/12/2013 when the plaintiff informed her that he was in arrears. **PW2** said the plaintiff had told her about the advertisement of 2nd December 2013. She continued that she had not been served with any notice under Section 96(2) of the Land Act. That she never received the letter dated 29/8/2013 that indicated it had been copied to her. That after payment of the Kshs.1 million, the plaintiff told her the bank manager was to give him a letter stopping the sale. She urged the court to set aside the sale as they are able to pay any monies being demanded by the bank.

9. In cross-examination, **PW2** said she became aware of the loan arrears in early December 2013. That they did not raise the whole amount neither did she see the 1st defendant manager's letter stopping the sale. That she was aware when the loan was taken and it had to be repaid. In further cross-examination by 2nd & 3rd defendants, **PW2** said the monthly repayments was about Kshs.100,000 thus arrears of Kshs.1.2m means the instalments due was for about 12 months. This marked the close of the plaintiff's case.

10. Kennedy Kasamba testified as **DW1**. He is the recovery manager of the 1st defendant based in Nairobi. He adopted his statement filed in court on 4th July 2018 as his evidence. **DW1** also relied on the documents in the list dated 22/11/2018 produced as Dex 1 – 7. That Dex 6 showed the plaintiff was in arrears. That the plaintiff was served with statutory notices using the address that was provided in the charge document and the letter of offer. **DW1** stated that the 1st defendant followed due process in exercising her statutory of sale. He urged the court to dismiss the suit.

11. In cross-examination by Mr. Wachira advocate for the plaintiff, **DW1** stated that he has been the recovery manager since the year 2006. That the plaintiff's statement show a deposit of Kshs.130,000 on 2/1/2014 and a deposit of Kshs.900,000 each on 24/12/2013 which may have been a cheque. That at page 3, the date of transfer is made on 23rd December 2013 and the transfer was executed by the bank. That the

duty of paying rates does not fall on the bank. **DW1** also said a valuation of the property was done before the sale but it was not included in their bundle of documents filed. **DW1** said he did not have a report of how many bidders attended the auction. **DW1** added that every registered letter is given a number prepared by the post office. That their duty ended at the point of registering the document to the last known address. **DW1** said he is aware the sale took place on 20/12/2013 as advertised. In re-examination, **DW1** stated that Kshs.130,000 was paid after the auction and it remained in the plaintiff's account as his money. This marked the close of the 1st defendant's case.

12. **FUAD ABDALLA BREK** testified as **DW2** on behalf of the 2nd & 3rd defendants. He adopted his witness statement made on 1st December 2017 together with the list of documents dated 14/9/2015 and 1/12/2017 produced as Dex 8 – 16th. **DW2** said he knew about the property from the advertisement placed on 2/12/2013 which said the auction would take place on 20/12/2013 at Motor Mart building.

13. **DW2** continued that on 20/12/2013, he paid a deposit of 25% through banker's cheque. The balance was paid on 24/12/2013. That they received the transfer documents on 2/1/2014 which they presented to the lands office for registration on 13/1/2014. They were then issued with a title deed. That they got court orders and entered the house on 11/9/2015 before the plaintiff coming with police from Bamburi Police Station to remove his people. That from then on, he has never accessed the house. He urged the court that the plaintiff be ordered to pay him Kshs.80,000 per month till surrender of vacant possession. He also prayed for dismissal of the plaintiff's suit.

14. In cross-examination by Mr. Wachira advocate for the plaintiff **DW1** said he would not know if the bank made a mistake before selling the property. That the 1st defendant gave him an executed transfer which he presented to the lands office after they signed their part. He could not tell why the transfer document was not dated. That he paid Kshs.480,000 as stamp duty but he did not have receipt of the payment in court. That he paid rates due up to date. **DW2** said he could not remember how many bidders attended the auction. In cross-examination by Jengo advocate for 1st defendant **DW2** said he did not see anything irregular in the sale nor that the transfer was improper. That the issue of stamp duty or rates was not raised in the pleadings the reason he did not avail the documents. This also marked the close of the 2nd & 3rd defendants' case. No evidence was led for the 4th – 6th defendants.

15. The parties took time to file their submissions. As at the time of writing this judgment, I only found the submissions by the 1st defendant. The 1st defendant gave a brief analysis of the evidence adduced and summarised their case thus:

i. The Banks at the plaintiff's own request advanced a mortgage facility of Kshs.7,650,000/=.

ii. The purpose of the facilities was to complete purchase of a residential property and a charge was registered over the suit property.

iii. The plaintiff defaulted in its obligations under the charge as at 28th February, 2013 he was in arrears to the tune of Kshs.7,750,570.40 prompting the defendant bank to commence recovery process through realization of its securities held in excess of its statutory power of sale which process started by issuance of all the requisite statutory notices as by law required.

iv. The plaintiff has never disputed owing the bank the outstanding sums and no settlement proposal was ever tabled or presented to the Bank for consideration of facility or at all.

v. The bank recovered a total of Kshs.12,000,000/= from the said sale which it applied towards settlement of the plaintiff's arrears and as at 30th December 2013 the plaintiff was still indebted to the defendant to the tune of Kshs.43,217.65/-.

vi. The suit property was sold by public auction to Fawzy Abdalla and Fuad Abdalla and the defendant executed transfers in favour of the purchasers, transfer registered on 13th January, 2014.

vii. All the mandatory statutory notices were issued and the procedure followed as required by the law.

16. From the pleadings and the evidence, I frame the following questions for my determination:

- a. Whether or not the plaintiff was in default of the loan facility at the time of the advertisement and subsequent auction?
- b. Whether or not the 1st defendant served the requisite statutory notices on the plaintiff before the auction.
- c. Whether the plaintiff has proved fraud against the defendants.
- d. Which of the two claims succeed?
- e. Who bears the costs of the suit?

17. It is not in dispute that the plaintiff Moses Mbugua Mehta obtained a loan facility from the 1st defendant as evidenced in the letter of offer and charge document produced as Dex 1 & 2 respectively. The repayment terms contained in the letter of offer dated 22/7/2009 provided that the plaintiff was to make monthly payments of Kshs.111,755/- over a period of 15 years. The security given was title No. L.R.MN/1/14414 CR NO. 42081 Shanzu-Mombasa (suit property). The plaintiff signed this letter of offer on 5th August 2009. He also executed the charge document dated 19th October 2009 before an advocate. In his evidence in Chief and Cross-examination the plaintiff said he understood his obligations and rights under the charge.

18. Both PW1 and PW2 admitted being in default to the tune of Kenya Shillings One Million Two Hundred Thousand only (Kshs.1.2m) as at 2nd December 2013. The plaintiff paid a sum of Kshs.1,000,000 to the 1st Defendant on 7th December 2013 and stated that upon payment of this sum, the 1st defendant's manager had given him a promise to call off the auction. The plaintiff agreed with the 1st defendant that in light of the monthly instalment payable, he was in arrears for about 12 months. That the sum of Kshs.1,000,000 paid on 7/12/2013 did not clear the arrears. The plaintiff's by his own admission was in default of the loan thus in breach of the contract between him and the 1st defendant. Accordingly under clause 10 of the charge document the 1st defendant was at liberty to realise the security.

19. The second issue raised is whether the statutory notices were served upon the plaintiff before the sale. Under Clause 13 of the charge, service of notices is provided that;

“That any notice or demand required or authorised by law or by this Charge to be served by the Bank on the Chargor shall without prejudice to any other effective mode of making the same be deemed to have been properly served on the Chargor if served on the Chargor or the personal representative of the Chargor personally or if left for the Chargor at the Chargor’s last known place of residence or business in Kenya or if sent by registered post in a stamped envelope addressed to the Chargor at the Chargor’s last known postal address in Kenya or if served in any of the above mentioned ways on an attorney holding a power of attorney where under such power of attorney the attorney is authorised to accept such service or if left in a conspicuous place on the Mortgaged Property. Where the addressee is a Company any notice required or authorised by law or by this Charge shall also be deemed to have been properly served by the Bank if served on any one of the Directors or the Secretary of the addressee or if delivered or sent by registered post telex or facsimile to the addressee at its registered office or any of its principal places of business in Kenya. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by post four days after posting (notwithstanding that it be undelivered or returned undelivered save where there is express statutory provision to the contrary) or if sent by facsimile on the completion of transmission. Where a notice or demand is sent by registered post it shall be sufficient to prove that the notice or demand was properly addressed and posted.” (Underline mine for emphasis)

20. The 1st defendant was only required to prove where a notice is served by registered mail that the same was properly addressed and posted. The plaintiff and his witness denied receiving any notices from the 1st defendant. He however admitted that the address contained in the statutory notice dated 18th March 2013 (Dex 3a) was his. Dex 3(b) was certificate of postage issued to the 1st defendant by the Postal Corporation of Kenya and dated 21st March 2013. The plaintiffs' name and address appear on this certificate. The 1st defendant thus discharged her responsibility under Section 90 of the Land Act. Another notice was also served upon the plaintiff as contained in the letter dated 29th August 2013 which was also sent under certificate of posting dated 12/9/2013.

21. The plaintiff admitted that between 20th January – 20th September 2013, he had not made any payment to the bank. At the time the property was advertised for sale on 2nd December 2013, the loan was in arrears. The plaintiff saw the advertisement placed in the Daily Nation and informed his wife (PW2). He does not indicate why he did not attend or stop the auction. However he alleges there was fraud because there was no valuation done before the auction. That since he was in possession, he did not see any valuer doing a site visit for purposes of valuation. The plaintiff did not tell the Court that they left the house from 8am – 5pm everyday given that he is a pilot and hotelier while his wife said she is a business woman leaving room for a possibility of the valuer coming while they were away.

22. The plaintiff in his list of documents has not presented a valuation report to state the value of the suit property. He also did not state that the property was sold at any under value. He did not ask to be supplied with a copy of the valuation report. The rule of evidence is that he who alleges a fact must prove it. Further proof of fraud is on a strict liability and it is not enough to plead it. The plaintiff not having attended the auction nor done a valuation of the property have no basis to state that the auction was a sham or fake or that the 2nd & 3rd defendants were not present at the auction and or that the 1st defendant grossly undervalued the suit property to his detriment (as per particulars of fraud set out in paragraph 8 of the amended plaint).

23. The plaintiff also accused the defendants of transferring the suit land during the pendency of this suit. The plaintiff has admitted that vide his plaint dated 7/1/2014, he only sued the bank (1st defendant). This was after the auction had taken place on 20/12/2013. The registration of the transfer was done on 13/1/2014 by which time there was no order stopping the registration. The 2nd and 3rd defendants had also not been joined to his suit. The record does show that the court only granted an order of status quo (As between plaintiff and 1st defendant) on 13th February 2014 by which time the property had left the hands of the 1st defendant. The registration into the names of 2nd & 3rd defendants was done in July 2014 before they were joined to the plaintiffs' suit. The doctrine of *lis pendens* could not affect them since they were not parties to the pending suit.

24. Which of the two claims succeed? From the evidence presented, the plaintiff has not made out a case against the bank (1st defendant) and or the 2nd & 3rd defendants because at the time of the auction he was in arrears of the loan. Secondly he was duly served with the statutory notices. Thirdly, he never stopped the auction nor the transfer and registration of the suit title in the names of the 2nd and 3rd defendants. His claim thus fails and is hereby dismissed.

25. On the other hand, the 2nd & 3rd defendants have demonstrated that they purchased the suit property and acquired title after due process was followed. That the 1st defendant executed a transfer in their favour after they paid the entire purchase price which is evidenced in the plaintiff's bank statements produced as Dex 6. Therefore they are entitled to vacant possession of the suit property and peaceful enjoyment thereof. Accordingly, I find that their suit is merited and allow it.

26. Consequently I enter judgment for the 2nd & 3rd defendants in accordance with their amended plaint except prayer (iii) mense profits is awarded to run at Kshs.80,000 per month from the 10th February 2017 when the amendment was made to include the prayer until the time they get vacant possession. Costs of the suit is awarded to the 1st, 2nd & 3rd defendants.

27. The plaintiff (Moses Mbugua Mehta) is granted 60 days from the date of delivery of judgment to voluntarily surrender vacant possession. In default, the 2nd & 3rd defendants are at liberty to evict him and recover any such costs from him. These are the orders of the Court.

Dated and signed at Busia this 19th day of November, 2019.

A. OMOLLO

JUDGE

Delivered and Read at Mombasa this 27th day of November, 2019

C.YANO

JUDGE

In the Presence of:

Counsel for the Plaintiff:

Counsel for the Defendants: