



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**ELC CASE NO. 38 OF 2017**

**JACKSON KIPNGETICH KOMEN.....PLAINTIFF**

**VERSUS**

**K-REP BANK LIMITED.....1ST DEFENDANT**

**GARAM INVESTMENTS.....2ND DEFENDANT**

**BENJAMIN MALAKWEN KOECH.....3RD DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaint dated 10th May, 2011 the Plaintiff filed suit against the defendants claiming that his land parcel number KERICHO/MUNICIPALITY BLOCK2/83 had been wrongfully sold by the 1<sup>st</sup> and 2<sup>nd</sup> defendants at a public auction to recover a loan he owed to the 1<sup>st</sup> defendant. In particular, he alleges that the 1<sup>st</sup> defendant did not issue the requisite statutory notices and that the 2<sup>nd</sup> defendant did not comply with the Auctioneers Rules as he failed to issue a Notification of sale. He later sought leave to amend his plaint to enjoin the 3<sup>rd</sup> defendant who bought the suit property.

**Background of the case**

2. The Plaintiff alleges that sometimes in the year 2009, the 1st Defendant advanced to him certain financial facilities in the sum of Kshs 3,000,000/= that were secured by a charge over his property being Property Title No. Kericho Municipality Block 2/83 (the “Suit Property”). The Plaintiff alleges that he had all along been servicing the loan.

3. The Plaintiff further alleges that he was surprised to see an advertisement in the Daily Nation dated 11th April, 2011 by Garam Investments Limited, the 2nd Defendants herein stating that they would hold a public auction for the sale of the Suit Property on 27th April, 2011.

It is the Plaintiff’s case that the purported sale was premature as he had never been served with the requisite statutory notices. He also states that he was neither served with a Notification of Sale nor any Notice of Redemption and his efforts to raise the said issues with the manager of the 1st Defendant one Mr. Nyaga proved fruitless. The Plaintiff asserts that despite his efforts to stop the sale, he was informed that the auction had been conducted and the property sold.

4. In his Amended Plaintiff dated 7<sup>th</sup> October, 2011 the Plaintiff sought the following prayers:

*(a) A declaration that the 1<sup>st</sup> Defendant's power of sale has not arisen over the land parcel known as KERICHO MUNICIPALITY/BLOCK 2/83.*

*(b) A declaration that the purported sale of 27<sup>TH</sup> April 2011 by the defendants of the land parcel known as KERICHO MUNICIPALITY/BLOCK 2/83 is unlawful.*

*(c) A mandatory injunction to restrain the 1<sup>st</sup> Defendant from transferring the land parcel known as Kericho Municipality/Block 2/83.*

*(d) A mandatory injunction to restrain the 3rd Defendant from taking up possession of or in any way trespassing onto or transferring the land parcel known as KERICHO MUNICIPALITY/BLOCK 2/83.*

*(e) In the alternative and only in the event that prayers (b) (c) and (d) cannot be granted damages as may be quantified by this Honourable Court.*

*(f) Costs and interests of this suit.*

*(g) Any other further relief that this honourable court may deem fit and just to grant.*

5. The 1st and 2nd Defendants filed their joint defence dated 7th June, 2011. In the said defence they deny that the said sale was unlawful and maintain that they sold the plaintiff's property in exercise of the 1<sup>st</sup> defendant's power of sale after issuing the requisite notices and complying with all the statutory and regulatory requirements governing the power of sale. The Defendants further assert that the sale was occasioned by the Plaintiff's default in repayment of the loan despite numerous notices and reminders.

6. In his defence and Counterclaim dated 15th February 2012, the 3rd Defendant states that he is a bona fide purchaser of the suit property having purchased the same at an auction where he was the highest bidder at Kshs. 4,500,000/-. He further argues that a Certificate of Sale was subsequently issued and the transfer of the suit and completed.

7. He argues further that the plaintiff's right of redemption was extinguished by the 1st Defendant exercising his statutory power of sale through the 2nd Defendant in an auction that was held on 27<sup>th</sup> April, 2011.

8. The 3rd Defendants seeks a declaration that he is the bona fide purchaser of the suit property and that vesting order ought to issue vesting the suit property to him. He also seeks a permanent injunction restraining the Plaintiff from trespassing or dealing with the suit property in any manner detrimental to the interests of the 3rd Defendant.

9. At the time of filing suit, the Plaintiff obtained temporary orders of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from transferring the suit property to the purchaser. On 11<sup>th</sup> November, 2013 the 3<sup>rd</sup> defendant filed a notice of Motion seeking to have the temporary orders of injunction discharged. On 25<sup>th</sup> March, 2014 the parties recorded a consent to the effect that pending the hearing and determination of the main suit, the 3<sup>rd</sup> defendant do remain in occupation of the suit property but is restrained from selling, charging, transferring or wasting the suit property.

10. The case came up for directions on 26<sup>th</sup> March, 2015 before Justice Sila Munyao who transferred it to Kisii court as he had acted for the Plaintiff when he was in practice. The case was fixed for hearing in Kisii before Justice Mutungi on 30<sup>th</sup> March, 2017 when it was transferred back to Kericho ELC. It was then set down for hearing on 7<sup>th</sup> November, 2017. On the said date the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants did not attend court though they were duly served. The court therefore dismissed the plaintiffs case

against the defendants and proceeded with the hearing of the 3<sup>rd</sup> defendant's counterclaim against the Plaintiff.

### **3<sup>rd</sup> Defendant's case**

11. In his testimony, the 3<sup>rd</sup> Defendant stated that he attended a public auction on 27<sup>th</sup> April, 2011 conducted by the 2<sup>nd</sup> Defendants herein. He stated that he bid for the suit property and being the highest bidder he purchased the same for Kshs 4,500,000. He states that he paid Kshs. 1,500,000/- upon the fall of the hammer and was issued with a certificate of sale dated 27<sup>th</sup> April, 2011. He further states that he paid the balance in installments with the final payment being by way of cheque on 3<sup>rd</sup> May, 2011.

12. The 3<sup>rd</sup> Defendant further testified that he obtained the consent of the Commissioner of Lands for the transfer of suit property. However, before registration of the said transfer, the Plaintiff filed the instant case in which he obtained an order of injunction restraining him from selling the land.

The 3<sup>rd</sup> Defendant prays that the court issues a vesting order vesting the suit property into his name and further that the court issues a permanent injunction restraining the Plaintiff from trespassing onto the suit property as well as costs of the counterclaim.

### **3<sup>rd</sup> Defendant's Submissions**

13. The 3<sup>rd</sup> Defendant counsel filed his written submissions dated 27<sup>th</sup> November, 2011 in which he argues that the suit property having been sold through a public auction confirms that the statutory notices had crystalized. He argues further that a certificate of sale having been issued to the 3<sup>rd</sup> Defendant and the 2<sup>nd</sup> Defendant having transferred the suit property to the 3<sup>rd</sup> defendant, the plaintiff's rights were extinguished and it is therefore difficult for the court to grant the orders sought in the Plaintiff.

14. The 3<sup>rd</sup> Defendant further argues that if indeed the Plaintiff had been servicing the loan then he would have had the evidence to stop the impending auction. It is worth noting that the Plaintiff has not in any of his pleadings or documents filed in court produced any receipts or indeed any other evidence to show that he had been repaying the loan as per the terms stipulated in the charge.

### **Issues for Determination**

15. Having considered the respective pleadings whose content is summarized above as well as the submissions of the 3<sup>rd</sup> Defendant which are set out above in brief, I have distilled the following as the issues arising for determination:-

- (a) Whether the purported exercise of the statutory power of sale was unlawful;
- (b) Whether the 3<sup>rd</sup> Defendant was an innocent purchaser for value who acquired a good title to the suit property;
- (c) Whether the 3<sup>rd</sup> defendant is entitled to the reliefs sought in his counterclaim;
- (d) Who bears the costs of the suit?

### **Analysis**

#### **(a) Whether the Plaintiff's exercise of the Statutory Power of Sale was unlawful**

16. The Charge over the suit property dated 17<sup>th</sup> February 2009 (the "Charge") was registered under the Registered Land Act. It is therefore instructive to note that the law applicable to the exercise of the Statutory Power of Sale is the Registered Land Act Cap 300 Laws of Kenya (now repealed).

17. The Plaintiff's case is hinged on the fact that the 1<sup>st</sup> Defendant had not issued him with the statutory Notice under the Registered Land Act and therefore the power of sale had not yet arisen. The Plaintiff also argues in his Plaint that the 2<sup>nd</sup> Defendant had failed to comply with the Auctioneers Rules which require them to serve the Plaintiff with a Notification of Sale as well as the requisite 45 days' Notice of Redemption.

18. Section 74(1) of the Registered Land Act aptly titled "Chargee's Remedies" makes provision for the exercise of the statutory power of sale in instances where a chargor has defaulted in repayment of a loan. The section provides in part as follows:

*(1) If default is made in repayment of the principal sum or of any interest or any other periodical payment or any part thereof, or in the performance or observance of any agreement expressed or implied in any charge and continues for one month, the chargee may serve on the charger a notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.*

*(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may:-*

*a. Appoint a receiver of the income of the charged property; or*

*b. Sell the charged property.*

19. It is trite law that non service of a statutory notice constitutes a fundamental breach of the provisions of section 74 of the Registered Land Act which derogates from the chargor's equity of redemption. In essence, without service of a valid statutory notice the power of sale does not crystallize and any act done by the bank to dispose the suit property amounts to an illegality. In the circumstances it is imperative for this court to be settled in its mind on whether there was indeed proper service of all the requisite notices that are to be served prior to the exercise of the statutory power of sale.

20. In their joint statement of defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant assert that the Plaintiff was served with all the requisite notices and denies the allegation by the Plaintiff that they were never served.

21. In the affidavit sworn by Joseph Gikonyo Mungai behalf of the 2<sup>nd</sup> Defendant on 2<sup>nd</sup> June 2011, in response to an application for injunction he asserts that he effected service of the notification of sale as well as letter of notice upon the son of the Plaintiff who allegedly declined to sign in acknowledgement of service. He avers that this prompted him to prepare an affidavit under Rule 15 (c) of the Auctioneers Rules 1997. The said Certificate is annexed to his affidavit.

22. Mr. Mungai further alleges that he served another copy of the notification of sale and the letter of notice vide registered post and annexes a certificate of posting to this effect. He also annexes a Certificate issued under section 15 (c) of the Auctioneers Rules 1997.

23. Mr. Frank Kilonzo, a debt recovery officer of the 1<sup>st</sup> Defendant swore the Affidavit on 2<sup>nd</sup> June 2011 on behalf of the 1<sup>st</sup> Defendant. In the said affidavit he stated that he was aware from the records of the 1<sup>st</sup> Defendant that the Credit Risk Officer of the 1<sup>st</sup> Defendant had written a final reminder to the Plaintiff dated 16<sup>th</sup> April, 2010 requiring him to make good his default within 14 days from the date thereof and notifying him of the action that would follow in the event that he did not comply.

24. Mr. Kilonzo further states that he personally prepared a statutory notice which he caused to be served on the Plaintiff by way of registered post. The said notices are annexed to his affidavit as evidence that the Plaintiff was served with the statutory notice as required under section 74 of the Registered Land Act Cap 300 (now repealed).

25. I have also noted the contents of paragraph 12(h) of the Charge which states in part as follows:

***“Any notice required by this charge or authorized by law to be served upon the Chargor by the Chargee shall be deemed to be sufficiently served if it be sent by post in a stamped envelope addressed to the Chargor at his last known postal address in Kenya or if it is delivered to the Chargor’s place of business”***

In the circumstances, I am satisfied and I do find that there was indeed proper service of all the requisite notices that were required to be served in order for the power of sale to crystallize. In the circumstances, the acts done by the bank to dispose of the suit property cannot be dismissed as illegal as the Plaintiff purports to do.

26. Section 74(2) of the Registered Land Act (now repealed) which is the law under which the Charge is administered provides that where the chargor does not comply within 3 months of the date of service of the statutory notice then the chargor may either appoint a receiver of the income of the charged property or sell the charged property.

The bank was therefore well within its rights to exercise its statutory power of sale.

27. The Court of Appeal in the case of **Nancy Kahoya Amadiva v Expert Credit Limited & another [2015] eKLR** restated the need for the court to respect the sanctity of commercial contracts entered into by parties by stating as follows: -

*“it is clear in our minds that the court has a duty to uphold the rights of parties who have negotiated a commercial transaction and as a result one party acquires or achieves some benefits which she does not wish the other party to recover or enforce through the instrument that created the relationship. In that view we are guided by this Court’s decision in Aiman vs Muchoki (1984) K. L. R. 353 where it was held as follows;*

***“In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer”.***

*Moreover, where the 1<sup>st</sup> appellant was aggrieved and felt defrauded, she also had recourse under the law in reporting the matter to the police for their further investigation and action. No evidence was tendered to this end by the 1<sup>st</sup> appellant”*

**b) Whether the 3<sup>rd</sup> Defendant is an innocent purchaser for value:**

28. The 3<sup>rd</sup> Defendant herein avers that he is an innocent purchaser for value without notice of any fraud or impropriety. In the case of **Lawrence Mukiri v Attorney General and 4 Others [2013]** as well as **Katende v Haridar and Company Limited** the court defined a bona fide purchaser as follows:

***“...a bona fide for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:-***

- (a) He holds a certificate of title;***
- (b) He purchased the property in good faith;***
- (c) He had no knowledge of the fraud;***
- (d) The vendors had apparent valid title;***
- (e) He purchased without notice of any fraud;***

**(f) He was not party to any fraud.”**

29. This brings us to the question on the extent of due diligence to be exercised by a purchaser at a public auction. The Court of Appeal has held that there is no duty placed on such a purchaser where he participates in an auction that has been duly advertised.

The court in considering a similar question in the case of **Abdi Adan Hussein & 2 others v Attorney General & 2 others [2017] eKLR** held as follows: -

*“The plaintiff argues that he was an innocent purchaser for value and was not party to any fraud. This brings me to the question; what is the extent of due diligence to be exercised by a purchaser? In **Captain Patrick Kanyagia and Another v Damaris Wangeci and others, NBI civil appeal no 150 of 1993 (unreported)** the Court of Appeal held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by the court of appeal in **David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR**. In **Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported)**, the Court of Appeal held that a purchaser at a public auction was protected by **section 69(B)** of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice.*

*In the present case, the defendants have not demonstrated that the plaintiffs had any notice of irregular exercise of the statutory power of sale by the 1<sup>st</sup> respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 1st plaintiff, the action to purchase was based on the advertisement for sale advertised in the newspaper. The plaintiffs duly participated in the auction and their bid was accepted.” We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security. (Pall J, in **Muhani and Another v National Bank of Kenya Limited [1990]KLR**)”*

30. The Plaintiff in his further amended plaint dated 10th May, 2011 makes allegations of fraud on the part of the Defendants. It is trite that fraud requires a higher standard of proof than ordinary civil cases. Not only must allegations of fraud be particularized but they must also be specifically proved at a standard higher than the ordinary standard.

The court in the case of **Ruhangi Properties Limited & 2 others v Standard Chartered Bank of Kenya Ltd & 2 others [2000] eKLR** considered similar allegations and stated as follows:

*“Fraud of course, in addition to requiring particulars, requires a higher standard of proof. Establishing a prima facie case of fraud with a probability of success especially on affidavits presents the plaintiffs’ advocate with a very difficult task; more so when as here the statute provides that in these circumstances damages are an adequate remedy. The difficulties in relation to a prima facie case of fraud were considered by the Court of Appeal in CA 215/96 Central Kenya Limited v Trust Bank and others at pages 9-11 of the judgment. The onus is on the applicant and the burden of proof is heavier than in an ordinary civil case”.*

31. In the instant case, it is my finding that the 3<sup>rd</sup> defendant was an innocent purchaser for value without notice of any fraud or impropriety. Furthermore, no fraud has been proved against the 1<sup>st</sup> and second defendants.

**c) Whether a Vesting Order in respect of the suit property should issue in favour of the 3<sup>rd</sup> Defendant**

32. The 3rd Defendant who is the Plaintiff in the counterclaim is seeking for orders that a Vesting Order does issue vesting the suit property in his favour. It is common ground that the 3rd Defendant purchased the suit property at a public auction held on 27th April, 2011 pursuant to instructions issued by the 1st Defendant to the 2nd Defendant and he was duly issued with a certificate of sale dated 2<sup>nd</sup> April, 2011.

33. I am inclined to agree with the submissions made on his behalf that the plaintiff's right over the suit property were extinguished upon exercise of the statutory power of sale. The court of appeal in the **Nancy Kahoya** case (*supra*) stated as follows on this point:-

*“Property passes to the purchaser and thus the mortgagor loses his equity of redemption upon execution of a valid contract of sale. It is not allowed to continue until conveyance or registration notwithstanding that some time elapses before conveyancing formalities are completed vesting the legal title to the purchaser. (See **Fisher and Lightwood Law of Mortgages** and **James Ombere Okoth case (supra)**). The cases follow the rule enunciated*

*in **Mbuthia v Jimba Credit Corporation and another** by Apaloo JA though dissenting):*

*“Since then, the law is settled that the equity of redemption is lost on the completion of a valid agreement for a valid sale (see **Ze Yun Yang v Nova Industrial Products Limited [2003] 1 EA 362**). This is notwithstanding that the mortgagee and purchaser may adjust the conditions of the contract as they agree. It is not lost on us that the 2<sup>nd</sup> respondent by the acceptance of his bid during the public auction and subsequent completion of a valid agreement for sale of the suit premises effectively locked out the appellants right of redemption over the suit premises. The Registration of Lands Act, which is inapplicable in the present case, on the other hand expressly provides for this duty in **section 77(1)** thereof.”*

34. Having found that there was no illegality in the sale, there is no reason why the suit property should not be vested in the 3<sup>rd</sup> defendant.

The Court in the case of **Janet Mwendwa v Nancy Mavutha Musyaka [2017] eKLR** declined to set aside a vesting order that had been issued by the Magistrate's court on the basis that it found no impropriety or illegality in the conduct of the public auction.

### **Whether a permanent injunction should issue against the Plaintiff**

35. The 3<sup>rd</sup> defendant testified that even though he has been in occupation of the suit property since 2011, there is an order of injunction in place restraining him from selling, charging, transferring or wasting the property. His use of the suit property has therefore been limited yet he has established that he is legally entitled to the said property. No doubt if the plaintiff is not restrained from interfering with the suit property the 3<sup>rd</sup> defendant will suffer irreparable damage which cannot be adequately compensated by damages. In the circumstances the temporary injunction that was issued against him ought to be vacated and substituted with an injunction against the plaintiff restraining him from interfering with the 3<sup>rd</sup> defendant's quiet and peaceful enjoyment of his property.

### **Conclusion**

36. The upshot is that the 3<sup>rd</sup> defendant has proved his counterclaim against the plaintiff on a balance of probabilities.

I therefore dismiss the plaintiff's case against all the defendants and enter judgment for the 3<sup>rd</sup> defendant on his counterclaim against the plaintiff in the following terms:

- a) The plaintiff's claim against the defendants is dismissed with costs to the 3<sup>rd</sup> defendant.

b) A declaration is hereby issued that the 3<sup>rd</sup> Defendant is the bona fide purchaser for value of all that parcel of land known as KERICHO/MUNICIPALITY BLOCK 2/83 situate within Kericho Municipality.

c) A vesting order is hereby issued vesting all that property known as KERICHO/MUNICIPALITY BLOCK 2/83 unto the 3<sup>rd</sup> Defendant.

d) A permanent injunction is hereby issued restraining the plaintiff by himself, his servants, agents or anyone acting on his behalf from trespassing into or dealing with land parcel number KERICHO/MUNICIPALITY BLOCK 2/83 situate within Kericho Municipality in any manner that is detrimental to the 3<sup>rd</sup> defendant's quiet possession and enjoyment of the same.

e) The 3<sup>rd</sup> defendant shall have the costs of this suit and the counterclaim.

**Dated, signed and delivered at Kericho this 24<sup>th</sup> day of January, 2018.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of :**

1. Mr. Miruka for the 3<sup>rd</sup> Defendant.

2. Plaintiffs absent

3. 1<sup>st</sup> and 2<sup>nd</sup> Defendants absent

4. Court assistant - Rotich