



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 167 OF 2008

GRACE WANGUI NJORU.....1ST PLAINTIFF

FRANCIS NDEGWA MURAGE.....2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT

AZIZ ATITALA.....2ND DEFENDANT

JUDGEMENT

By a Plaint filed on 14th October, 2008, and amended on 22nd July, 2014, the Plaintiffs seek judgement against the Defendants for:

- a) Declaration that the suit premises were sold below market value and hence the public auction was null and void;
- b) A declaration that the sale of the suit premises to the 2nd Respondent is illegal;
- c) That the transfer of the suit premises was based on an improper auction;
- d) Compensation based on the true market value;
- e) Costs of the suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to grant;
- f) Any other relief this Honourable Court may deem just to grant

The 1st Defendant entered appearance and filed a Defence on 1st December, 2014 where it denied the averments in the Plaint and admitted that its valuer Paragon Properties Limited valued the suit premises at Kshs. 6, 700,000 but denies that the said suit premises is valued at Kshs. 9,850,000. It denies the public auction was based on an under valued report or that the property was sold for a sum below the market value with the aim of only serving the 1st Defendant. It admits the 2nd Plaintiff participated in the public auction and offered the highest bid of Kshs. 5 million whilst the 2nd Defendant offered a bid of Kshs. 4.5 million respectively. It averred that the 2nd Plaintiff failed to pay the deposit for the bid amount as required by the Auctioneers culminating in the offer being extended to the second highest bidder who is the 2nd Defendant herein. It hence denies the Plaintiffs suffered any loss or damage as alleged and puts them to strict proof. Further that the 2nd Plaintiff's claim if any is statute barred under the Limitation of Actions Act and that the Amended Plaint does not disclose any cause of action against it and should be struck out.

The 1st Plaintiff granted authority to the 2nd Plaintiff on 22nd March, 2017 to plead, act and appear on her behalf. Matter proceeded to full hearing

Evidence of Plaintiff

PW1 Francis Ndegwa Murage who is the 2nd Plaintiff herein confirmed during his examination in chief that he is the husband to the 1st Plaintiff and have been married for 45 years. He confirmed that they guaranteed one Lawrence Gitonga Njogu to obtain a loan of Kshs. 2.5 million from the 1st Defendant in 2003, which loan was not repaid. He adopted the 1st Plaintiff's witness statement and List of Documents filed on 29th October, 2014 as evidence before the court. The said documents were produced as exhibit P '1 – 18'. He sought the Court to declare that the sale of the suit land to the 2nd Defendant was illegal as the purchase price was way below the 75% of the value of the suit property as provided by law. He reiterated that the valuation report used by the bank was way below the cost of the materials used to build

the house and wanted the court to consider compensation based on market price. He questioned the valuation report but never disputed it. He prayed for costs of the suit.

During cross examination he confirmed producing his wife's statement as evidence in court, and that all the allegations were against the auctioneer. He stated that there was a case he filed against the auctioneer vide Nairobi HCCC No. 351 of 2007 before filing this instant suit but the case was dismissed as he was not party to the suit. Further that as per the Certificate of Sale dated 6th July, 2007, the Auctioneer was acting on instructions from the 1st Defendant. He insisted in the auction done on 6th July, 2007, he was the highest bidder and had offered Kshs. 5 million. He reiterated that the value of the suit land was way below the market value and he was coming to purchase it at the reserve price. Further that no reserve price had been indicated in the newspaper or anywhere. He said he had to pay 25% deposit by noon of 6th July, 2007 but failed to do so as there was a receptionist at the Auctioneer's office who informed him the Auctioneer had left.

In re - examination he reiterated that he was not able to pay the deposit because the Auctioneer had backed out and given them up to 12 noon but by the time he reached the office at 11.30 am there was no one to receive the money. He offered to pay Kshs. 5 million for the suit land. Further that there was a Chief Executive Officer of Sharelink Finance who offered to give him Kshs. 6 million to pay and redeem the property and sell it to a third party for Kshs. 48 million. He insists the Auctioneer was acting for the 1st Defendant. He confirmed there was a ruling dated the 25th September, 2007 by Justice Osiemo who removed the Auctioneer from the suit, with the same being amended accordingly, leaving the 1st Defendant as the only Defendant.

The 1st Plaintiff's Statement was adopted by the Court. She had reiterated their Claim herein and insisted the suit land had been sold at an under value.

The Plaintiffs thereafter closed their case.

Evidence of the Defendant

DW1 – Janet Muthee

DW1 who is an Assistant Manager Debt Recovery Unit at the 1st Defendant stated that she was not in employment with Equity Bank on 6th July, 2007 but is conversant with the instant case. She denied that any deposit was paid by the Plaintiff and that at the time of filing the Amended Plaint herein, the 2nd Defendant was already registered as the owner of the suit property. She reiterated that she wanted the Plaintiffs' claim against the 1st Defendant to be dismissed with costs. She produced various documents as exhibits to support the bank's defense.

During cross examination she confirmed she was not working with the Bank at the time of the auction. She insisted by 12 pm on 6th July, 2007, the highest bidder should have paid 25% of the reserve price. Further that she did not have any receipt to prove the 2nd Defendant paid the 25% of the reserve price by 12 pm on 6th July, 2007. She referred to the title deed of the suit property and confirmed that the said property was charged to Housing Finance Company of Kenya (HFCK) on 4th July, 2008 for a sum of Kshs. 4.5 million. Further that this was the same amount of money equivalent to the purchase price for the suit property. She denied that the 2nd Defendant took a loan with HFCK to pay Equity Bank. She stated that at the time of offering the loan facility in 2003, the suit land was valued at Kshs. 6.5 million while in April, 2007 before the Sale, a Valuation was conducted by the 1st Defendant through messers Paragon Valuers Limited who valued the suit property at Kshs. 6.7 million and that the auction took place in July, 2007. She contended that they did not refuse to accept the money from the 2nd Plaintiff to redeem the suit property and allowed a third party to do so. She claimed the auction was done in accordance with the law and they are not liable for the action of the auctioneer. She did not know why the Auctioneer sent a letter to the Land Registrar dated the 6th July, 2007. She later stated that as at 6th July, 2007, no monies had been paid by the 2nd Defendant. She confirmed on 31st July, 2007, a sum of Kshs. 500,000 was deposited in the Plaintiffs' loan account. Further that there was a Court order dated the 27th July, 2007, from the 1st Plaintiff, and this made the Bank not to receive the money as at the date of auction and the said Court Order was to lapse on 31st July, 2007. She averred that when they did not receive an undertaking from the 1st Plaintiff, they took the Kshs. 500,000 from the 2nd Defendant who was the highest bidder. She stated that as per the Certificate of Sale dated the 6th July, 2007, no payment had been received by the bank, and as at the said date, there was no Court Order barring the 1st Defendant from receiving any monies from anyone. She reiterated that the sale by public auction took place and the highest bidder who was the 2nd Plaintiff, was given an opportunity to pay 25% deposit by noon of the said date. She was informed by two colleagues namely Purity Kinyanjui and Leakey Wanjau that the 2nd Plaintiff was granted more time to raise the 25% deposit or give an undertaking, and it was not the first time the Plaintiffs had been in discussion with the bank, but they failed to pay any monies. She reaffirmed that the borrower Lawrence Gitonga Njogu advised the 1st Defendant to proceed and sell the suit property because the money he got from the bank was given to the 1st Plaintiff. She did not produce the said correspondence from the borrower but insisted the bank, granted the Plaintiffs time to pay or give an undertaking but this was on agreement.

During further cross examination she reiterated that they do not have any control over the Auctioneers behavior. She referred to the List of Attendees at the auction and noted they wrote in their own handwriting and there was an observer from the bank called Leakey Wanjau. Further she noted it was indicated 25% of 5 million or 4.5 million to be paid by noon on 6th July, 2007, but did not have any records showing any of the amounts was paid. She insisted the Certificate of Sale dated the 6th July, 2007 could have been issued anytime depending on where the monies were being sourced from. She referred to the letter dated the 6th July, 2007 from Sheflo Auctioneers and confirmed the bank did not authorize the transfer of the suit property and she did not know why the Auctioneer issued the said letter. Further that from the Auctioneer's Newspaper Advertisement, there was no reserve price indicated. She confirmed they did not have a receipt from the Auctioneer indicating the 25% deposit was paid as the same was paid into the account. Further that the bank got the undertaking from HFCK when the 2nd Plaintiff failed to pay the deposit as they went to the second bidder. She claims on 9th July, 2007 when the 2nd Plaintiff was in the office, she did not know what the discussion was about.

During re examination she stated that no reserve price had been indicated but it was Kshs. 4.5 million. She confirmed receiving several letters from Sheflo Auctioneers but was categorical that she was not in a position to respond to queries from the Auctioneer, as the bank had no control over the auction except for sending an observer. As for the handwritten List of persons who attended the auction, she stated that she was not in a position to tell who wrote it. She referred to the bank statement and confirmed that the 1st Deposit of Kshs. 500,000 was paid on 31st July, 2007 and insisted it was not the 25% deposit as this was from the second bidder. Further that the 25% deposit is to be paid by the highest bidder was not subjected to the 2nd bidder. She reiterated that since the 25% deposit was not received on 6th July, 2007, the highest bidder was allowed more time to raise it, but this was through an oral arrangement on 9th July, 2007. Further that, the 1st Defendant was served with a Court Order dated the 27th July, 2007, vide Nairobi HCCC No. 351 of 2007 which was to lapse on 30th July, 2007. The said order was issued for 14 days, with the Applicant therein expected to file an undertaking as to damages by 30th July, 2007 failure of which the Court Order was to lapse. Since there was no Undertaking filed, the Court Order lapsed on 30th July, 2007. She explained that the second bidder contacted the firm of Miller & Company Advocates who gave a Professional Undertaking to the 1st Defendant, which the bank accepted. She confirmed that they waited upto 11th June, 2008 when Nairobi HCCC No. 351 of 2007 was dismissed after which they were advised by the lawyers Miller & Company to proceed with the transfer and that is the reason why the suit land was charged on 4th July, 2008.

The Defendant thereafter closed their case.

Both the Plaintiffs and 1st Defendant filed their respective written submissions that I have considered.

Analysis and Determination

Upon perusal of the pleadings filed herein including evidence of PW1 and DW1, the main issues for determination are the following:

- Whether the suit property was undervalued before being sold by Public Auction on 6th July, 2007
- Whether the Auctioneer evaded to receive the 25% deposit from the 2nd Plaintiff who was declared the highest bidder
- Whether the 1st Defendant is liable for the actions of the Auctioneer
- Whether the Plaintiffs are entitled to damages
- Whether the Plaintiffs are entitled to any remedy against the 2nd Defendant
- Who will pay the costs of the suit.

As to whether the suit property was undervalued before being sold by Public Auction

As per the Plaintiffs' contention that the suit land was valued at Kshs. 9,850,000 but the 1st Defendant's Valuers messrs Paragon Property Valuers Ltd valued it at Kshs. 6,700,000; while the same was sold through public auction in July, 2007 for Kshs. 4.5 million, which was way below the value of the suit premises. DW1 admitted that at the time of taking the loan in 2003, the suit land was valued at Kshs. 6.5 million while in 2007 before the Sale, it was valued at Kshs. 6.7 million. At the time of the auction, DW1 stated that the same was sold at Kshs. 4.5 million. The Plaintiffs averred that the suit property was sold at an undervalue and as such for a sum way below the market value and this was done with an aim to only serve the interest of the 1st Defendant. I find that the Defendant as the Chargee did not obtain the best reasonable price for the suit property and before the same was acquired. The 1st Defendant insists the Plaintiffs have filed a multiplicity of suits concerning the subject matter herein to wit: Nairobi HCCC NO. 351 of 2007; Nairobi CMCCC No. 10077 of 2006 and HCCC No. 483 of 2004. I note it is only the HCCC No. 351 of 2007 that was filed after the auction, the rest of the law suits were instituted before the disputed auction. I find that the existence of these suits cannot invalidate the Plaintiffs' claim in the current suit.

Section 77 of the Repealed Registered Land Act provided that: '(1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction through a licensed auctioneer for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit.'

While Section 97 of the Land Act provides that:

'(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and

(b) the chargor whose charged land is being'

I note that both the Land Act and the repealed Registered Land Act expect a Chargee to get the best price and act in good faith with the best interests of the Chargor before selling a charged property. The question we need to ponder is whether the best interest of the Chargor was catered for in this auction. In the current scenario, I find that this was not the case. If the discrepancy in the two valuation reports is anything to go by, then there was no good faith in the auction. The variation in the two valuation reports was too wide. I note the suit land was valued at Kshs 6.5 million in 2003 and four years later it was valued at Kshs. 6.7 million which was a difference of only Kshs. 200,000. The Court takes judicial notice of the fact that the property market in Kenya appreciates steadily no matter the location and Upper Matasia where the suit land was situate is no exception. I further find that there was no forced Sale valuation at the time of the auction as a requirement by the law.

As to whether the 1st Defendant is liable for the actions of the auctioneer.

First and foremost I note that the Auctioneer was acting on instructions from the 1st Defendant. Secondly, the 1st Defendant's agent was present during the auction. It was the 2nd Plaintiff's contention that he was declared the highest bidder, having bid KShs. 5 million but the Auctioneer was elusive and ensured he was not able to pay the 25% deposit. The manner in which the auctioneer acted raises eyebrows. I note the 25% deposit was paid by the 2nd highest bidder much later, on 30th July, 2007 and yet the 2nd Plaintiff was given only two hours on the 6th July, 2007 to raise the money. There seems to have been a collusion between the Auctioneer and some unknown parties who seemed hell bent to deny the 2nd Plaintiff a chance to redeem the suit property. The Auctioneer sent a letter dated the 6th July, 2007 informing the 1st Defendant about the auction and seeking their instructions to accept the second bid of the 2nd Defendant of Kshs. 4.5 million. There was no response from the 1st Defendant to the said letter and DW1 confirmed she did not understand why the letter was sent to them. The said Auctioneer further prepared a Certificate of Sale dated the 6th July, 2007 confirming that the 2nd Defendant was the highest bidder having purchased the suit land for Kshs. 4.5 million. The Auctioneer also sent a letter dated the 6th July, 2007 to the District Land Registrar Kajiado which letter stated as follows:

' We sold the above property by public auction on Friday 6th July, 2007 at 11 am at our offices Ufundi Sacco Plaza, 5th Floor, Moi Avenue, Nairobi to Aziz Atitala and Asha Ibrahim Amber IDs 9290869 and 13664646 respectively of P.O. Box 19002 -0501 Nairobi for Kshs. 4,500,000 (Four Million Five Hundred Thousand) only. Enclosed find the relevant documents to enable you transfer the same to them.'

All these actions of the Auctioneer are contrary to the averments of DW1 that the 2nd Plaintiff was granted more time to raise the 25% deposit and was in their offices on 9th July, 2007 where an oral agreement had been reached. However, the Auctioneer indicates the second bidder bought the suit land at 11 am and yet he gave the Plaintiff upto 12 pm to raise the said 25% deposit. DW1 confirmed that the 2nd Defendant paid the 25% deposit on 31st July, 2007 as evidenced by the payment in the Plaintiffs' loan account. Further that they received an undertaking on 31st July, 2007 from messrs Miller & Company Advocates, who were the Advocates for HFCK that they would pay the sum of Kshs. 4.5 million to the Equity Bank within 14 days upon successful registration of the Transfer and Charge in favour of the Purchaser. I note this payment and undertaking was done 24 days after the auction and yet the Auctioneer had already prepared a Certificate of Sale and informed the Land Registrar to transfer suit property to the 2nd Defendant. From the statement of the loan account, it is worth noting that the 2nd highest bidder only paid for the suit property a year later and this is further evidenced by the fact that he took a mortgage from HFCK to pay the loan. What is strange, is why it was so difficult for the 1st Defendant to give the 2nd Plaintiff even one week to redeem the suit property. It is my finding that the alleged auction was stage managed to the detriment of the Plaintiffs whose matrimonial home was sold to a third party.

As to whether the Plaintiffs have a remedy against the 2nd Defendant, who purchased the suit land through the purported auction. The Plaintiffs insist the sale of the suit property to the 2nd Defendant should be declared illegal as it was based on an improper auction, and should hence be deemed null and void.

Section 99 of the Land Act provides as follows:

(1) This section applies to—

- (a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or**
- (b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.**

(2) A person to whom this section applies—

- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;**
- (b) is not obliged to see to the application of the purchase price;**
- (c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.**

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some

way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

In so far as I have already made a finding that there were several anomalies during the auction of the suit property, I however note that the same had already passed to the 2nd Defendant and his wife who are the current registered owners of the suit land.

In the case of **Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Ors (2005)** eKLR Kimaru J held as follows: **“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 chargor 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.”** It is against the foregoing and in relying on the legal provisions above, that I find that the Plaintiffs cannot hold a claim against the 2nd Defendant as he purchased the suit land from an auction and is protected by law. The Plaintiffs only remedy lie against the 1st Defendant to compensate them in damages for an improper auction.

As to whether the Plaintiffs are entitled to damages against the 1st Defendant in referring to the finding in the Case of **Bomet Beer Distributors** above, I note that there was a huge discrepancy between the two valuation reports. Further that there was no forced sale valuation undertaken by the 1st Defendant, with the suit property only being sold at Kshs. 4.5 million and yet it had been valued at Kshs. 9,850,000. The Auctioneer’s acts during the date of sale were suspicious and clearly hellbent to defeat the 2nd Plaintiff highest bid. I find that there was indeed an injustice to the Plaintiffs by the 1st Defendant and its agent SHEFLO AUCTIONEERS who not only sold the suit property at an undervalue but ensured the 2nd Plaintiff who was the highest bidder was not able to pay the 25% deposit. All the averments of DW1 that the 2nd Plaintiff was allowed more time to pay the 25% deposit are not proven as she did not provide documentary proof to corroborate it. What is interesting is that the Certificate of Sale was issued by the Auctioneer to the 2nd bidder on 6th July, 2007, yet DW1 claims they allowed the Plaintiff more time to pay the 25% deposit. This points to an element of dishonesty and connivance on the part of the Auctioneer and the 1st Defendant. The sale of the suit property culminated in the Plaintiffs being evicted from their matrimonial home.

In the case of **Kamau Mucuha vs Ripples Ltd CA No. 106 of 1992, the Kenya Court of Appeal** the court held that: -

“A party as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.”

In relying on the case above and against the foregoing I find that the Plaintiffs indeed suffered damages due to the injustices meted against them by the Auctioneer including the 1st Defendant. Further, I find that the Plaintiffs are indeed entitled to general damages as a pecuniary compensation which will make good the loss they suffered as a result of the wrongdoing from the Auctioneer and 1st Defendant. I will proceed to award them general damages amounting to Kshs. 3,000,000.

Who should bear the Costs of the suit?

Costs generally follow the event, and in this instant case I do award the Plaintiffs the costs of this suit.

In the circumstances, I find that the Plaintiffs have proved their case on a balance of probability and proceed to allow the prayers sought in the plaint and enter judgment in their favour by making the following final orders :-

- a) General Damages be and is hereby awarded to the Plaintiffs amounting to Kshs. Kshs. 3,000,000
- b) The costs of the suit are awarded to the Plaintiffs
- c) Interest at Court rates on (a) and (b) above.

Dated signed and delivered in open court at Kajado this 13th day of March, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

2nd Plaintiff in person

Omulupi for 1st Defendant