



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 2267 OF 2007 (O.S.)

BEATRICE WAMBUI MUTURI.....APPLICANT

VERSUS

LUBUMBULA KWATEMBA.....1ST RESPONDENT

JULIUS NKONGE NKABU.....2ND RESPONDENT

JUDGEMENT

1. The Applicant filed the Originating Summons on 12/11/2007 seeking an order directing the Registrar of Lands to lift the caveat placed by the 1st Respondent on her land known as L.R. Number 209/7196/71 (“the Suit Property”). In the alternative, she seeks to have the 1st Respondent directed to show cause why the caveat should not be lifted. She also seeks an eviction order against the 2nd Respondent or his agents who are trespassing on the Suit Property.
2. The Applicant also seeks mesne profits from 27/4/2005 up to the date of eviction and the costs of this suit. The suit is based on the grounds that the Applicant bought the Suit Property in 2005 from the Central Bank of Kenya Limited, to whom the Suit Property was charged by the 2nd Respondent to secure payment of a loan; and that the 1st Respondent had illegally and wrongfully placed a caveat against the Suit Property. The Originating Summons is supported by the Applicant’s affidavit sworn on 12/11/2007.
3. The 1st Respondent opposed the suit through the Replying Affidavit he swore on 19/12/2014. He claims that he purchased the Suit Property from the 1st Respondent with the approval of the Central Bank of Kenya (“the Bank”) and paid the 1st Respondent the sum of Kshs. 2 Million and that the Bank later refused to give him the completion documents forcing him to lodge a caveat against the Suit Property to protect his interest as a purchaser.
4. The 2nd Respondent filed the Replying Affidavit which he swore on 2/10/2013 in which he admits that he entered into an agreement with the 1st Respondent to sell to him the Suit Property. He referred to the other suits pending in court over this Suit Property and argued that the suit was fatally defective. He states at paragraph 8 of the affidavit that he became aware of the caveat when the 1st Respondent wanted to pay the Bank and its staff was reluctant to release the completion documents to him.
5. A little background of the facts in this case will shed some light on what is in dispute. The 2nd Respondent was an employee of the Central Bank and was eligible for a loan to purchase a house. He executed a charge over the Suit Property in favour of the Bank to secure repayment by him of the sum of Kshs. 536,000/= and a further sum of Kshs. 70,000/=. The transfer and charge were both registered on 16/8/1989. He was later dismissed from employment by the Central Bank and sued the Bank when the Bank took steps to realise its security over the Suit Property.
6. The Applicant produced copies of the notices of public auction together with the advertisement placed in the *Daily Nation* of 21/12/2004. She also produced a copy of the Memorandum of sale confirming that the Suit Property was sold at a public auction which took place on 6/1/2005 and she was declared the purchaser at the price of Kshs. 2.3 million and paid a deposit of Kshs. 625,000/=. She produced copies of banker’s cheques dated 6/1/2005 and 1/2/2005 for Kshs. 625,000/= and Kshs. 1,675,000/= respectively payable to the Central Bank of Kenya. A transfer by chargee was prepared and duly executed in 2005 between the Bank and the Applicant, a copy of which was produced together with a copy of the title for the Suit Property which shows the caveat placed by the 1st Respondent.
7. The letter from the Applicant’s advocates to the 2nd Respondent dated 27/4/2005 informed the 2nd Respondent that the Applicant had purchased the Suit Property by public auction and had no objection to his continued stay in the house as long as he paid a monthly rent of Kshs. 20,000/=. The letter notified him that if the advocates did not receive his response it would be deemed that the contents of the letter were acceptable to him.
8. The Applicant also produced copies of the judgement in Nairobi **HCCC No. 1750 of 1995 Julius Nkonge Nkabo v. Central Bank of Kenya** and the court of appeal decision in **Nairobi Civil Appeal No. 81 of 2000**. In **Nairobi Civil Appeal No. 81 of 2000 Central Bank of**

Kenya v Julius Nkonge Nkabu the Court of Appeal stated at page 10 that the 2nd Respondent had admitted that he had not fully repaid the loan to Central Bank. He had also admitted that he had been served with the requisite statutory notice and that he did not comply with it. The court stated that by reason of that evidence the High Court Judge had no basis for interfering with the exercise of the statutory power of sale. The Court of Appeal set aside the judgement of the High Court in Civil Suit No. 750 of 1995 and substituted it with an order dismissing the 2nd Respondent's suit with costs. The Court of Appeal gave its decision in February 2002.

9. In his Replying Affidavit, the 1st Respondent claims that he was approached by a friend in October 2004 who informed him that a property was being sold in Harambee Estate, Nairobi. The 2nd Respondent took him to the offices of the Bank and introduced him to the Bank officials who were handling the issue. He claims the Bank officials confirmed to him that the Suit Property was available for sale and that he could enter into an agreement with the 2nd Respondent. He entered into an agreement dated 4/1/2005 with the 2nd Respondent by way of private treaty and purchased the Suit Property for Kshs. 2 million.

10. He claims he informed the Bank that he was ready to complete the transaction after he had paid the 2nd Respondent. He later realised that the Bank officials were reluctant to provide the requisite documents for completion of the sale and caused a caveat to be registered against the Suit Property. He avers that the Bank frustrated the agreement despite his willingness to complete the transaction with the 1st Respondent.

11. The 2nd Respondent produced a copy of the sale agreement that he entered into with the 1st Respondent. It is dated 4/1/2005. It states at paragraph 8 that the Suit Property was sold in vacant possession on completion and that it was subject to the conditions and acts under which the title was issued. The special conditions attached to the agreement did not mention the fact of the property being charged to Central Bank of Kenya. It only contained conditions relating to the apportionment of rates, payment of advocates' costs and the interest rate applicable which was 15% per annum. Special condition number 3 stipulated that the purchaser would not be entitled to possession nor to receipt of the rents and profits of the property until the purchase price was paid in full.

12. He also produced a copy of court order given on 27/1/2012 in **ELC No. 1785 of 2007** through which the court dismissed the Applicant's suit for failing to show cause why the suit should not be dismissed. The court ordered that the Plaintiff would be given 90 days to set down the suit for hearing and if no action was taken the suit would stand dismissed.

13. The copy of title he produced confirms that the 1st Respondent placed a caveat against the Suit Property claiming purchaser's interest. The caveat is registered as entry number 7. Entries numbers 4 and 5 dated 17/8/1989 are a transfer to the 2nd Respondent for Kshs. 500,000/= and a charge to the Central Bank of Kenya for Kshs. 536,000/= respectively. Entry Number 6 dated 8/7/1992 was a further charge to Central Bank of Kenya for Kshs. 70,000/=.

14. Through the letter dated 10/7/2013, the Bank informed him that it had realised the Suit Property in 2005 and applied the sale proceeds towards clearing his outstanding house loan and was left with a surplus. The letter asked him to furnish the Bank with his details to facilitate payment of the surplus amount which had been left pending in the Bank's books for a long time.

15. In his submissions filed in court, the 2nd Respondent claims that he regularly serviced his loan with the Bank until September 1993 when he was dismissed for gross misconduct and charged in court with the offence of stealing by servant contrary to Section 281 of the Penal Code. He was acquitted in April 1993 and sued the Bank for wrongful dismissal. The High Court allowed his claim but the Court of Appeal set aside the judgement on appeal.

16. The 2nd Respondent challenges the sale of the Suit Property and denies being served with the statutory notice of the intended auction. He claims that he requested the Bank to allow him to sell the property through private treaty but that the Bank officials who had vested interests in the matter thwarted his attempts.

17. He submits that the Applicant did not acquire a valid title over the Suit Property since the auction did not comply with the required statutory notice. He submits that the Applicant is not entitled to an award of damages and mesne profits since she is a stranger to him having not obtained a title to the Suit Property. In essence he argues that the suit ought to have been filed by the Bank which was the chargee and not the Applicant.

18. The 2nd Respondent argues that the 1st Respondent has legal title over the Suit Property since he sold the Suit Property to him and he introduced him to the chargee who had agreed to cooperate with him on the sale of the Suit Property to the 1st Respondent but later changed its mind. He claims the Bank acted in bad faith by preventing the 1st Respondent from completing the transaction and refusing him to offset the loan.

19. The 2nd Respondent supports the 1st Respondent's position that it was proper for the 1st Respondent to register a caveat over the Suit Property and urges the court to dismiss this suit.

20. The 2nd Respondent relied on the case of **Elizabeth Wambui Njuguna v Housing Finance Company of Kenya Limited** [2006] eKLR which dealt with the issue of statutory notice for sale of charged property. The decision was in respect of an application for injunction and the court found that the Applicant had not satisfied the requirement to show a *prima facie* case with a probability of success.

21. The 1st Respondent submits that he acquired the Suit Property in good faith from the 2nd Respondent and is a *bona fide* purchaser for value and therefore deserves the protection of the court since the 2nd Respondent is the registered owner of the Suit Property. He claims the Applicant has come to court with unclean hands having previously filed a suit over the Suit Property which was dismissed by the court. He claims he was a stranger to the sale of the Suit Property by the Central Bank of Kenya to the Applicant. He also denies that the 2nd

Respondent was served with statutory notice as required by law. He submits that he paid the full purchase price to the 2nd Respondent and thus registered the caveat to protect his interest.

22. The issue for determination is whether the court ought to order the removal of the caveat placed by the 1st Respondent against the Suit Property and whether the Applicant is entitled to the mesne profits she seeks in the Originating Summons.

23. The Court has considered the matter. It is not disputed that the 2nd Respondent charged the Suit Property to the Bank and that he failed to pay the loan. The 1st Respondent paid the purchase price of Kshs. 2 Million to the 2nd Respondent and not the Central Bank which held the title to the Suit Property as security for the payment of the loan owed to it by the 2nd Respondent. No evidence was tendered to show that the 1st Respondent attempted to pay the purchase price to the Central Bank. He paid it to the 2nd Respondent who in turn should have paid it to the Bank to redeem the Suit Property.

24. The Court of Appeal already made a finding in the **Nairobi Civil Appeal No. 81 of 2000 Central Bank of Kenya v Julius Nkonge Nkabu** that the statutory notice was duly served on the 2nd Respondent.

25. The Applicant relied on the judgement of Shah J.A. in **Captain Patrick Kanyagia & Another v Damaris Wangechi & 2 Others** [1995] eKLR in support of the position that no duty is cast in law on an intending purchaser at an auction properly advertised, to inquire into the rights of a mortgagee to sell. The Judge went further to discuss Section 60 of the Transfer of Property Act (which applied to the Suit Property but has been repealed) on the right of the mortgagor to redeem his property. The proviso to that section stated that the right to redeem could be extinguished by act of the parties, or by order of the court and where the mortgagor had entered into a binding contract for sale of the mortgaged property either by public auction or private contract.

26. The 1st Respondent admits in his evidence that at the time he entered into the sale agreement with the 2nd Respondent to purchase the Suit Property he was aware of the fact that the Suit Property was charged to the Central Bank of Kenya. He nevertheless paid the purchase price to the 2nd Respondent. The caveat he lodged against the Suit Property cannot confer title to him. Without first having the charge discharged, the Suit Property could not have been transferred without the participation of Central Bank which held the title as security for payment of the loan owed by the 2nd Respondent.

27. The letter from the Applicant's advocates to the 2nd Respondent dated 27/4/2005 addressed to the 2nd Respondent stated that the Applicant had no objection to his continued stay in the house as long as he paid a monthly rent of Kshs. 20,000/=. The 2nd Respondent has been in possession of the Suit Property.

28. The court finds that the 2nd Respondent's right to redeem the Suit Property was extinguished when the Applicant bought the Suit Property at the public auction and entered into a binding contract of sale with the Central Bank of Kenya. The 2nd Respondent could not therefore have sold the Suit Property to the 1st Respondent before discharging it. The caveat placed by the 1st Respondent against the Suit Property ought not to have been registered while the charge and further charge were still in existence

29. The court finds that the Applicant has proved her case on a balance of probabilities and directs the Registrar of Lands to lift the caveat placed by the 1st Respondent against the Suit Property. An eviction order is issued against the 2nd Respondent from the Suit Property to be effected within 45 days of the date of this judgement.

30. The 2nd Respondent will pay mesne profits to the Applicant assessed at Kshs. 20,000/= per month from 27/4/2005 until the date of the eviction. The Applicant is awarded the costs of this suit to be borne by the 2nd Respondent.

Dated and delivered at Nairobi this 28th day of May 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Oluoch Olunya for the Applicant

Mr. Wati for the 1st Respondent

Mr. Wati holding brief for Mr. Arum for the 2nd Respondent

Mr. V. Owuor- Court Assistant