



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

PETITION NO. 1 OF 2014

IN THE MATTER OF ARTICLES 22(1234) 23 (1, 2, 3 (a, b, c, d, e & f), 25 c), 40 (1, 2 &3b), 37 (1,2, &3), 165, 3A and 67 OF THE CONSTITUTION

AND

**IN THE MATTER OF THE CIVIL PROCEDURE ACT SECTIONS 1A, 1B, 3A and 63
AND IN THE MATTER OF LAND REFERENCE NO.KERICHO/ KIPCHIMCHIM/1690**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012 SECTION 71 (1a, 2 & 3)

MARTIN MAURICE ODHIAMBO.....PETITIONER

VERSUS

JOEL KIPSANG A. NGENO.....1ST RESPONDENT

KENYA COMMERCIAL BANK.....2nd RESPONDENT

DAWNING AGENCIES.....3RD RESPONDENT

M/S ORINA &CO ADVOCATES.....4TH RESPONDENT

LAND REGISTRAR.....5TH RESPONDENT

CONSOLIDATED WITH KERICHO HC JUDICIAL REVIEW APPLICATION NO. 2 OF 2014

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR, KERICHO....1ST RESPONDENT

MARTIN MAURICE ODHIAMBO.....2ND RESPONDENT

KENYA COMMERCIAL BANK.....INTERESTED PARTY

EX-PARTE

JOEL KIPSANG NGE'NO.....APPLICANT

JUDGMENT

Introduction

1. This judgment relates to two suits namely Kericho ELC Petition No. 1 of 2014 and Kericho HC Judicial Review Application No. 2 of 2014. The first suit herein was commenced by way of a Petition dated 23rd January, 2014 which was subsequently amended on 15th May, 2017. In the said Petition, the Petitioner seeks the following prayers:

1. *That the public auction dated 28th May 2003 be set aside on the grounds of irregularity and fraud as the 2nd Respondent had received some payment from the Petitioner on the same property and the same has also lapsed in law.*
2. *That the Respondents be permanently be restrained jointly and severally by themselves, their directors, employees, servants and/or any authorizing agents from dealing with that parcel of land registered as KERICHO/KIPCHIMCHIM/1690 for the applicant paid kshs. 120,000 to the 2nd Respondent for the same property and has been in occupation for the last 24 years.*
3. *That a declaration do issue directed to the 2nd Respondent for a valid discharge of the suit property upon payment of Kshs. 475,000 and the title be registered in the name of the Petitioner as initially agreed between the Petitioner and the 1st and 2nd Respondents and the same be paid within 90 days from the date of judgment/ruling.*
4. *The 5th Respondent (District Land Registrar be ordered to effect transfer of the said land KERICHO/KIPCHIMCHIM 1690 into the name of the Petitioner and the balance of Kshs. 475,000 be paid as earlier agreed or deposited in court within 90 days from the date of judgment/ruling.*
5. *Any other or further orders and relief that the court may deem fit to grant.*
6. *Costs and interest of this Petition be given.*

2. I must state from the outset that even though this suit was framed as a Petition, the prayers and facts therein do not lend themselves to a Petition. However, in view of Article 159 (2)(d) of the Constitution, I shall not dwell on the technical inadequacies.

3. The facts giving rise to this Petition are as follows: By a charge dated 4th December 1986 one Stephen Muya charged his property known as KERICHO/KIPCHIMCHIM/1690 to secure a loan of Kshs. 540,000 from Kenya Commercial Finance Company Limited which was at the time a subsidiary of Kenya Commercial Bank Limited. The said Stephen Muya was unable to repay the loan and he requested the bank to allow him to sell the suit property to the Petitioner on condition that the Petitioner takes up responsibility of paying the sum of Kshs. 595,000 which was the outstanding debt owed by him to the bank at that time.

4. By its letter dated 2.4. 91, the bank accepted the offer to have the chargor loan repaid by the Petitioner upon the sale of the charged property to the Petitioner and a sale agreement dated 18th April 1991 was signed between the Stephen Muya (chargor) and the Petitioner. The bank then held discussions with the Petitioner where it was agreed that the Petitioner would pay the bank what he considered as his personal contribution towards the payment of the purchase price for the suit property after which the Petitioner was at liberty to apply for a loan from the bank to finance the balance of the purchase price. The Petitioner requested for additional facilities to develop the suit property but he was advised that this request would be considered after he had paid the outstanding amount.

5. Pursuant to the said letter, the Petitioner paid the sum of Kshs. 120,000 to the bank by three installments of Kshs. 20,000, Kshs. 50,000 and Kshs. 50,000 through his cheques dated 8.10.1991, 10.11.1991 and 10.12.1991. Thereafter, the Petitioner did not make any further payment to the bank nor did he apply for a loan as had been intimated. Stephen Muya however handed over the suit property to the Petitioner who took possession thereof and has been living thereon from 1991 to date.

6. When there was no payment forthcoming from the Petitioner, in 2001, the bank advertised the suit property for sale in exercise of its statutory power of sale. This jolted the Petitioner into action and he once again approached the bank for negotiations on how to repay the balance of Kshs. 475,000. It was agreed that the Petitioner would repay the outstanding amount within 90 days from 10th May 2001 on condition that if he did not pay the said amount within the stipulated period, he would forfeit the earlier payment of Kshs. 120,000.

7. The bank instructed its lawyers, Oraro & Company Advocates to draw up the agreement for the Petitioner's signature but when the agreement was sent to the Petitioner, he refused to sign and sent it back to the lawyers. He subsequently failed to pay the outstanding loan. On 28th February 2003, the bank eventually sold the suit property to the 1st Respondent for the sum of Kshs. 720,00 in exercise of its statutory power of sale. The bank has been unable to transfer the suit property to the 1st Respondent as the Petitioner placed a caution on the title claiming a purchaser's interest. It is this sale that gave rise to the instant suit.

8. Previously the Petitioner had filed Kericho HCC Case No 34 of 2003 (O.S) where he sought *inter alia* an injunction to stop the bank from the selling the suit property by public auction on 28.2.2003. In 2014 the 1st Respondent filed Kericho HC Judicial Review Application No. 2 of 2014 (J.R) against the bank, the Land Registrar Kericho and the Petitioner seeking the following prayers:

- a) *That this Honourable Court be pleased to issue an order of mandamus compelling the Land Registrar to register the discharge of charge and effect the transfer in respect of L.R NO KERICHO/KIPCHIMCHIM1690 in favour of the applicant.*
- b) *That this Hounourable Court do issue an order of prohibition restraining the 2nd Respondent by himself, agents, servants, employees or otherwise from occupying, assigning and/ or in any other way interfering with the applicant's proprietary interest in land parcel no KERICHO/KIPCHIMCHIM1690.*

9. The Petitioner withdrew Civil Suit No. 34 of 2005 while Petition No. 2 of 2014 was consolidated with this suit. In this suit the Petitioner

has sued the 3rd Respondents as the auctioneers who conducted the sale of the suit property and the firm of Orina & Co Advocates who were acting for the 2nd Respondent. He has also sued the District Land Registrar, Kericho.

10. In Petition No 1 of 2014, the 1st and 5th Respondents did not file any response.

11. The 2nd Respondent has challenged the Petitioner's suit through the Replying affidavit of Mr. Bonnie Okumu, its Head of Legal Services sworn on the 26th August 2015. The gist of the said affidavit is that the 2nd Respondent was within its rights to exercise its statutory power of sale after the petitioner failed to honour its commitment to repay the outstanding loan after paying the initial deposit of Kshs. 120,000.

12. The 4th Respondent filed Replying affidavit sworn by Mr. Eratus Orina Advocate in which he deponed that he had no interest in the suit property save that he represented the 1st Respondent in HC Judicial Review Application No. 2 of 2014.

13. In HC Judicial Review No. 2 of 2014, the 2nd Respondent (Martin Odhiambo) filed a Replying affidavit in which he repeats the contents detailed in Petition No 1 of 2014 and challenges the sale of the suit property to the applicant on the grounds that he was not given any notice yet the bank had received a sum of Kshs. 120,000 from him pursuant to the agreement between him the chargor. He depones that by accepting the said amount, the bank varied its statutory power of sell.

14. The two suits were canvassed by way of written submissions.

15. In his submissions, the Petitioner gives a chronology of events leading upto the sale of the suit property and argues that the 2nd Respondent's purported dealings with the suit property when the registered owner had surrendered his rights to the Petitioner with the knowledge and permission of the 2nd Respondent are void for all purposes as his interests were not taken into account at the time of sale. This is more so because the Petitioner paid the 2nd Respondent the sum of Kshs. 120,000 and he has been occupying the suit property since 1991.

16. He argues that by allowing the chargor to sell the suit property to the Petitioner on condition that he would take over the chargor's liabilities with the 2nd Respondent and accepting the Petitioner's deposit of Kshs. 120, 000, the 2nd Respondent varied its statutory power of sale. The Petitioner further argues that having stayed on the suit property for a period in excess of 27 years, he is entitled to the same by adverse possession.

17. Learned counsel for the 1st and 4th Respondents has submitted that the public auction conducted by the 3rd Respondent on behalf of the 2nd Respondent was valid as the Petitioner defaulted in payment of the outstanding loan after making the initial payment of Kshs. 120,000. The 2nd respondent was therefore within its rights to exercise its statutory power of sale. He argues further that since the law was complied with, the 1st Respondent who bought the suit property at the public auction conducted on 28th February, 2003 is entitled to the suit property.

ISSUES FOR DETERMINATION

18. Arising from the pleadings, affidavits and rival submissions, the following issues emerge for determination:

- i. Whether there is privity of contract between the 2nd Respondent and the Petitioner
- ii. Whether the 2nd Respondent varied its statutory power of sale when it accepted the sum of Kshs. 120,000 from the Petitioner.
- iii. Whether the 2nd Respondent was estopped from selling the suit property without taking into account the interests of the Petitioner
- iv. Whether the Petitioner is entitled to the reliefs sought
- v. Whether the Ex-parte Applicant in HC J.R No 2 of 2014 is entitled to the reliefs sought.

Whether there is privity of contract between the Petitioner and KCB

19. It is common ground that the 2nd Respondent allowed the chargor, Stephen Muya to sell his property to the Petitioner by private treaty in order to offset the chargor's outstanding loan of Kshs 595,000 even though no formal agreement was signed between the Petitioner and the bank. In furtherance of this agreement, the Petitioner paid a deposit of Kshs. 120,000 to the 2nd Respondent. Whereas the 2nd Respondent was willing to extend credit facilities to the Petitioner to clear the balance of the loan, the Petitioner neither applied for the loan nor made any further payments and instead engaged the bank in protracted correspondence spanning over a period of more than ten years.

20. From the affidavit evidence on record it is clear that there is no contract between the Petitioner and the bank.

21. According to **Cheshire, Fifoot and Formstons, the Law of Contract (14th Edition at page 34 and 35:**

“The first task of the plaintiff is to prove a definite offer made.. proof of an offer to enter into legal relations upon definite terms must be followed by evidence from which the court may infer an intention by the offeree to accept the offer.”

22. On the other hand, it is not in contention that Stephen Muya offered to sell the suit property to the Petitioner and sought the concurrence of the bank to do so. In its letter to the Petitioner dated 15th May 1991 states as follows:

“Sale of Plot:

As per the agreement between you and Mr. Stephen Muya, the purchase of the plot should be finalized first. We are prepared to give a loan of a proportion of the purchase price. Please therefore advise and forward your contribution to enable us formalize the purchase of the plot.”

23. By accepting the sum of Kshs. 120,000 from the Petitioner, the bank became intricately involved in the affairs between the Petitioner and Stephen Muya but the big question is whether this created privity of contract between the Petitioner and the bank.

24. It is trite law that the doctrine of privity of contract cannot confer rights or impose obligations on a stranger to it, that is, persons who are not parties to it. This was so held by the case of **Kanyene Karangaita V Gakombe Automobile Association and Another (2006) KLR** cited with approval in **Lucy Nungari Ngugi & 4 Others V National bank of Kenya Limited & Another (2015) eKLR** where the court observed as follows:

“The essence of the doctrine of privity of contract is that only the persons who negotiate and sign an agreement and therefore are privy to the same are entitled to enforce its terms. The only exception to the privity of contract rule is where the contract is made for the benefit of a 3rd party where the contract expressly states that a 3rd party has a right of enforcement and where it is the intention of the parties to give the third party a right on a term of the contract”

25. In the instant case, there is evidence that the bank received the sum of Kshs. 120,000 from the Petitioner. There is however no agreement setting out the terms between the bank and the Petitioner with regard to enforcement. This implies that no rights accrue to the Petitioner on the basis of representations or assurances not made expressly in writing and signed by the both parties. Furthermore, the agreement between the Petitioner and Stephen Muya was frustrated by the Petitioner’s failure to honour the terms stated therein. I therefore find and hold that there is no privity of contract between the bank and the Petitioner.

Whether the bank’s statutory power of sale was varied or extinguished

26. The facts of this case present a peculiar scenario in that even though the bank communicated its consent for the chargor to sell the charged property to the Petitioner upon certain conditions in its letter dated 15.5 1991, the Petitioner flatly refused to comply with the stated terms and declined to sign the agreement that had been drafted by the bank’s advocates. What this means is that the agreement between the chargor and the bank remained alive and was never at any time varied or extinguished by the parties. This is fortified by the fact that the sale agreement between the Petitioner and the chargor stood revoked for failure by the Petitioner to honour the terms thereof.

27. In my view therefore, the Petitioner deprived himself of any legal protection that would have accrued to him if he had signed the said agreement. To compound the Petitioner’s woes, he did not pay the outstanding loan owed by the chargor to the bank which would have entitled him to claim the suit property as a purchaser. This is inspite of the fact that bank was willing to extend credit facilities to him to pay the balance. Instead, the Petitioner took possession of the charged property and was lulled into a false sense of security that possession conferred proprietary rights on him. Unfortunately for the Petitioner the facts of this case do not lend themselves to a claim for adverse possession as he mistakenly believes.

Whether the bank was estopped from exercising its statutory powers of sale

28. Based on my finding that the charge was subsisting at the time of sale, there was nothing to stop the bank from exercising its statutory power of sale since the loan was still outstanding.

29. In his Petition the Petitioner prays that he be given a period of 90 days to pay the balance of Kshs. 475,000. This is the option that the bank gave him in 1991 and which he squandered through his failure to sign the agreement between him and the bank. It goes without saying that the bank having long sold the property to a third party at a public auction in 2003, this option is no longer open to the Petitioner.

30. Perhaps the only remedy that was open to the Petitioner after the sale of the suit property was to recover the sum paid to the bank but again, this would be subject to the Limitation of Actions Act Cap 22 of the Laws of Kenya which requires that a suit for the recovery of money be filed within a period of six years. This option must also be weighed against the fact that the Petitioner has been in possession of the suit property for close to 27 years without having without having fully paid for it.

Whether the Petitioner is entitled to the reliefs sought in the Petition

31. Even though I sympathize with the Petitioner, particularly because he did not have the benefit of legal counsel in order to appreciate the legal complexities presented by his case, the law does not permit me to grant the prayers he seeks. Consequently, it is my finding that the Petitioner has failed to prove his case and I dismiss it with costs.

Whether the ex- parte applicant in HC Judicial Review No. 2 of 2014 is entitled to the reliefs sought.

32. Flowing from my finding in the Petition, the Applicant’s application for Judicial Review in HC J.R No 2 of 2014 succeeds and I make the following orders:

a) An order of mandamus is hereby issued compelling the Land Registrar, Kericho to register the discharge of charge and effect the transfer in respect of L.R NO KERICHO/KIPCHIMCHIM1690 in favour of the applicant.

b) An order of prohibition is hereby issued restraining the 2nd Respondent by himself, agents, servants, employees or otherwise from occupying, assigning and/ or in any other way interfering with the ex-parte applicant's proprietary interest in land parcel no KERICHO/KIPCHIMCHIM1690

c) The 2nd Respondent shall pay the costs of this application to the ex-parte applicant.

Dated, signed and delivered at Kericho this 11th day of May, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Maurice Odhiambo, Petitioner appearing in person
2. Mr. Orina for the 1st and 4th Respondents in the Petition and the Ex-parte Applicant in Judicial Review Application No. 2 of 2014
3. No appearance for the 2nd, 3rd and 5th Respondents.
4. Court Assistant: Faith