



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO.39 OF 2013

JACOB OLOO OGUT.....PLAINTIFF

VERSUS

JAMES MATWERE MATARA.....DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 18th June 2013, the Plaintiff filed suit against the defendant seeking the following reliefs:

- a) A declaration that the Plaintiff is the legal proprietor of land parcel number KERICHO/KIPELARTET/1178 and that he be put in possession thereof.
- b) A declaration that the defendant's continued stay on the suit land is unlawful and that he ought to move out of the said land parcel number KERICHO/KIPELARTET/1178 and in default thereof an eviction order be issued against him.
- c) General damages and mesne profits from the date the plaintiff acquired ownership of the suit land described herein.
- d) Costs of the suit and interest on (3) and (4) herein.

2. The Plaintiff's case is that on 4th May 2006, the Defendant charged the suit property to Equity Bank to secure a loan of Kshs. 300,000. The Defendant failed to repay the loan within the stipulated period and the bank was left with no option but to sell the suit property to recover the outstanding loan.

3. The Defendant's case is that he attended an auction on 28th June 2012 in Kisumu where he bid for the suit property at and emerged the highest bidder after which he purchased the suit property for the sum of Kshs. 500,000.

4. It is the Plaintiff's case that after purchasing the suit property he went to take possession thereof but he was unable to do so as the Defendant refused to part with possession of the same, prompting him to file this suit.

5. The Defendant filed a Defence dated 11th August 2013 in which he states that if the alleged auction ever took place, then the same was illegal as no notice was served upon him by the bank as required by the law. He adds that if the sale is proved to have been done above-board then he would have no objection to parting with possession of the suit property.

Plaintiff's evidence

6. The hearing commenced on 27th February 2014 before Lady Justice Lucy Waithaka and was concluded on 26th February 2018. The Plaintiff testified and called 3 witnesses. The Defendant also testified but did not call any witness.

7. In his testimony the Plaintiff who testified as PW1 stated that he saw an advertisement for sale by public auction of the suit property. He attended the auction in Kisumu on 28th June 2012, bid for the same and was announced as the highest bidder at an offer of Kshs. 500,000. He paid the purchase price and he was subsequently issued with a title deed in his name. He further testified that when he went to take possession of the suit property, he found the Defendant in occupation and the Defendant refused to render vacant possession to him, prompting him to institute this case in court. He produced the certificate of sale, a copy of the title deed in the Defendant's name, transfer by charge, valuation report and a copy of the green card all in support of his case.

8. In cross-examination he stated that after he bought the suit property, he gave the Defendant notice to vacate the suit premises, to no avail.

9. PW2 Eric Osero, the Customer Service Supervisor, Equity Bank, Kisumu Branch testified that on 28th March 2006 the Plaintiff applied for a loan of Kshs. 300, 000 from Equity Bank, Kisumu Branch. The said loan was secured by a charge over the suit property registered on 4.5.2006. He testified that on 6.4.2009 the Plaintiff failed to pay the loan and he was issued with a 90 -day statutory notice indicating that if he failed to repay the outstanding amount, his property would be sold. He stated that when they did not receive any payment the bank engaged Legeno Valuers to value the suit property for purposes of sale. The suit property was subsequently sold by public auction and a transfer by chargee effected on 30.8.2012 after obtaining consent to transfer from the Land Control Board. He sought to produce the loan application by the Plaintiff, an offer letter dated 5.4.2006, the charge over the suit property, notice form the bank dated 6.4.2990, fee note form Legeno valuers, internal memo, transfer by chargee dated 14.8.2012, a letter releasing the title documents dated 27.8 2012, an internal memo dated 30.8.2012 and the title deed. Counsel for the Plaintiff objected to the production of the charge on the ground that it was not registered. He also objected to the statutory notice dated 6.4.2009 on the grounds that it ought to be produced by the maker. The objection was sustained and while all the other documents were produced, these two documents were not produced.

10. PW3, Robert Waweru Maina testified that he was an auctioneer form Antique Auctioneers. He stated that he was instructed by Equity Bank to sell the suit property. He served the Defendant with a redemption notice on 29.10.2009 after which he advertised the property for sale on 21.12.2009. The first auction was unsuccessful. He then attempted a second sale which was also unfruitful. He then advertised the property for sale for a third time on 10.1.2011 but it attracted no buyers. He eventually advertised the suit property for sale on 11.6.2012 and conducted the sale in Kisumu on 28.6.2012 when the plaintiff emerged the highest bidder with a bid of Kshs. 500,000 which he paid in full.

11. Mr Waweru produced several documents pertaining to the sale including the letter of instructions form the bank, an affidavit of service of the notice upon the plaintiff, the three advertisements, the memorandum of sale and certificate of sale. He stated that the instructions he received from the bank were accompanied by a valuation report which indicated that the property was valued at Kshs. 1,700,000. He said the forced value was Kshs. 1,000,000.

12. He explained that after the property failed to attract buyers on two occasions, the bank accepted to have it sold at Kshs. 500,000. He stated that there were 3 bidders during the sale and the plaintiff emerged as the highest bidder with a bid of Kshs. 500,000.

13. The Plaintiff called PW5, Geoffrey Komen Kibowen, the District Surveyor Kericho who testified that his surveyors visited the suit land on 26.2.2013 and filed a report which he produced as an exhibit. The report indicates that there is a permanent house on the suit land. The witness could not confirm whether or not the case had been filed by the time the survey was conducted.

Defendant's evidence

14. The Defendant testified that he took a loan of Kshs. 300,000 form Equity bank in 2006. The said loan was secured by a charge over the suit property. He stated that he defaulted in repayment of the loan. He negotiated a repayment plan and made some unspecified payments but he was served with a redemption notice by auctioneers in 2009. He denied that he was issued with a statutory notice and claimed that the sale was unlawful.

15. In cross-examination he admitted that he was issued with a statutory notice in 2009 but not in 2012. He claimed that the bank did not follow the right procedure fin selling his house. He admitted that the survey was conducted in February 2013 while the suit was filed in June 2013. He admitted that he did not take any action to challenge the manner in which the sale had been conducted.

16. After the close of the case both counsels filed their submissions.

17. Mr. Okungu learned Counsel for the Plaintiff submitted that the Defendant failed to repay the loan and the bank had no choice but to sell the charged property. He therefore lost his right to the said property. He submitted that the bank followed due process of the law.

18. Mr. Miruka learned counsel for the defendant has submitted that the sale of the Defendant's property by equity bank was unlawful and the Plaintiff therefore did not obtain a clean title. He has submitted that the bank did not satisfy the conditions laid down in the charge instrument. He has taken issue with the fact that the statutory notice was served upon the Defendant in 2009 yet the sale took place in 2012. He faulted the bank for failing to produce the defendant' statement of account. He submits that the bank failed to issue the requisite notices, failed to exercise due diligence and sold the defendant's property at an undervalue. He relied on the case of **Kaniki Karisa Kaniki V Kenya Commercial Bank & 2 Others (2016) eKLR** where the Court held that the sale was a nullity and restored the title to the chargor on the ground that bank had not followed the correct procedures.

19. In the instant suit the bank has not been enjoined as a party, If the Defendant intended to challenge the manner in which the sale was conducted, nothing stopped him from suing the bank. It is surprising that he is raising all these matters against a purchaser who is in law deemed to be a bona fide purchaser for value without notice. The court cannot cancel the title of a bona fide purchaser when no wrong is attributed to him. What the Plaintiff seeks in his plaint is that the Defendant vacates the suit property which was sold to the Plaintiff at a public auction after the Defendant failed to service the loan he took from Equity bank. In his evidence the Defendant admitted that he took a loan from Equity Bank, he admitted that he charged the suit property to secure the loan and that he defaulted in repayment of the loan. He also admitted that he was served with a statutory notice in 2009 yet he did nothing to redeem his property until it was sold after 3 failed attempts. If he was really serious about challenging the sale, he had more than ample time to do so. I am afraid the facts of this case are distinguishable from the Kaniki Karisa case and the said case does not apply.

20. I have considered the pleadings, evidence on record and the rival submissions and I find and hold that the Plaintiff has proved his case on a balance of probabilities. I however decline to grant mesne profits as the same were neither pleaded nor proved.

21. Accordingly, I enter judgment for the Plaintiff and make the following final orders:

a) A declaration is hereby issued that the Plaintiff is the legal proprietor of land parcel number KERICHO/KIPLELARTET/1178 and

that he shall take possession thereof within 90 days.

b) A declaration is hereby issued that the Defendant's continued stay on the suit land is unlawful and that he ought to move out of the said land parcel number KERICHO/KIPELARTET/1178 within 90 days failing which an eviction order shall be issued against him.

c) General damages in the sum of Kshs. 100,000.

d) Costs of the suit and interest on (c) herein at court rates until payment in full.

Dated signed and delivered at Kericho this 20th day of July 2018

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Okungu for the Plaintiff
2. Mr. Miruka for the Defendant
3. Court Assistant - Rotich