



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 328 OF 2013

DANIEL MUIRURI NJENGA

**PAUL KAGUNDA NJENGA (Suing as the Personal Representatives of the
Estate of the late JANE WANJIRU NJENGA)PLAINTIFFS**

VERSUS

STANDARD CHARTERED BANK OF KENYA LTD.....1ST DEFENDANT

JOSEPH WACHIRA NJUGUNA.....2ND DEFENDANT

MATEVE GUEST HOUSE LIMITED.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiffs brought this suit as the legal representatives of the estate of the late Jane Wanjiru Njenga who was also known as Jane Wanjiru Kagunda, (hereafter the late Jane Wanjiru Kagunda) who died on 27/7/2009. The Plaintiffs were appointed administrators of her estate vide letters of administration issued on 2/8/2011 and confirmed on 31/7/2012. The main asset of the estate of the late Jane Wanjiru Kagunda was L.R. No. Ndumberi/Ndumberi/1234 (“the Suit Property”) which the late Jane Kagunda had charged to the 1st Defendant on 19/8/2005 to secure payment of financial facilities advanced to the 2nd Defendant by the 1st Defendant of Kshs. 1.5 million together with interest. The late Jane Wanjiru Kagunda executed a further charge on 7/7/2006 for Kshs. 2.52 million together with interest using the Suit Property as security.

2. The Plaintiffs challenge the 1st Defendant’s action by which it increased the limit of the financial facilities to the 2nd Defendant bringing it to Kshs. 5.6 million on 23/7/2007 and 20/4/2009. They claim this was done fraudulently and set out particulars of the fraud in the plaint. The 2nd Defendant failed to repay the loan.

3. The Plaintiffs claim that the 1st Defendant purported to issue a statutory notice of sale dated 6/5/2011 when it knew or ought to have known that the chargor, Jane Wanjiru Kagunda had died on 27/7/2009 and no grant of letters of administration of her estate had been issued. The Plaintiffs challenged the 1st Defendant’s auction of the Suit Property which was held on 14/9/2011 whereby the Suit Property was sold to the 3rd Defendant for Kshs. 15.3 million. The Plaintiffs maintain that no sale by auction took place on that day. They seek the cancellation of the transfer of the Suit Property to the 3rd Defendant. They also claim that the Suit Property was sold at a gross undervalue without regard to its market value and that the 1st Defendant failed to render a true and proper account of the 2nd Defendant’s indebtedness secured by the charge and further charge. The Plaintiffs also seek general damages, costs of the suit and interest.

4. The 1st Defendant admits advancing credit facilities to the 2nd Defendant which was secured by the charge and further charge over the Suit Property. It contends that it offered to increase the limit of the financial facility advanced to the Defendant to Kshs. 5.6 million which offer the 2nd Defendant accepted. The offers were made vide letters dated 23/7/2007 and 20/4/2009 which the 1st Defendant claims were secured by the legal charge over the Suit Property and the personal guarantee of the late Jane Wanjiru Kagunda. The 1st Defendant denied the particulars of fraud set out by the Plaintiff. It maintains that it duly served a Statutory Notice and lawfully exercised its statutory power of sale on 14/9/2011 whereby Kshs. 15.3 million was realised from the sale of the Suit Property to the 3rd Defendant.

5. The 3rd Defendant stated in its Defence that it attended the auction conducted on 14/9/2011 and purchased the Suit Property as the highest bidder.

6. The 1st Plaintiff gave evidence. He is the administrator of his late mother's estate. It was his evidence that the 1st Defendant fraudulently advanced further monies to the 2nd Defendant without security and purported to extend this new debt to the charge and further charge without the consent of his late mother. He maintained that the 1st and 2nd Defendants forged his late mother's signature to make it appear that she had guaranteed the further loan facility advanced to the 2nd Defendant.
7. He urged that the 2nd Defendant owed his late mother and her estate a legal duty to repay the loan so that his late mother's title over the Suit Property could be discharged but the 2nd Defendant breached this obligation or acted indifferently to the potential loss his late mother's estate would suffer if the 1st Defendant exercised its statutory power of sale.
8. It was his evidence that they communicated to the 1st Defendant that there was no person who could validly represent the estate of his late mother but the 1st Defendant purported to serve a Statutory Notice dated 6/5/2011. He faulted the bank for not applying for letters of administration over his late mother's estate as a creditor and failing to release the details of the debt for purposes of having this included in the petition for letters of administration. He produced several documents including the charge dated 19/8/2005 and the further charge dated 7/7/2006 which his late mother executed.
9. He produced a copy of the death certificate showing that Jane Wanjiru Njenga died on 27/7/2009. He also produced some of the correspondence exchanged with the 1st Defendant. He instructed Muthoga Gaturu & Co. Advocates who wrote a letter to the 2nd Defendant which was copied to the 1st Defendant dated 28/1/2010 demanding the return of the title deed over the Suit Property. M/S Gadhia & Mucheru Advocates issued a demand letter to the 2nd Defendant on 8/1/2010 demanding full payment of the sum of Kshs. 6,050,396.45 within 14 days failing which the Bank would proceed with the realization of its security. The Plaintiffs' advocates wrote to the 1st Defendant's advocates, M/S Gadhia & Mucheru Advocates on 6/9/2010 seeking a statement of account.
10. The auctioneers notice giving 45 days for redemption of the property which was issued by Leakey's Auctioneers bears the names of Daniel Muiruri Njenga whose ID No. is given as 21891092 and Paul Kagunda Njenga on the part for signatures. Only the two names appear on the notice which was not signed. The notice dated 6/5/2011 was addressed to the Estate of Jane Wanjiku Kagunda (Deceased) and the 2nd Defendant.
11. The 1st Defendant's advocates wrote to the Plaintiff's advocates on 28/7/2010, which letter was received on 23/1/2013 stating that the Suit Property had been sold at an auction held on 14/9/2011. The letter stated at page 2 as follows:
- “...To date, we have not received the certificate of confirmation of grant and therefore the surplus funds are still held by their client.”*
12. The Plaintiff called Martin Esakina Papa, the document examiner who examined the signatures of the late Jane Wanjiru Kagunda appearing on the bank documents. The expert witness produced a report in which he concluded after examining the specimen signatures that the signatures on the charge documents and the one appearing in the other documents were not made by the same hand.
13. The 1st Defendant called Boniface Muchoki as a witness. He produced various documents including the charge, further charge and the correspondence exchanged. He also produced a copy of the 2nd Defendant's bank statements for the loan account. It was his evidence that the bank did not owe the Plaintiffs the responsibility of providing a statement of account without the Plaintiffs demonstrating an interest in the Suit Property. This, he stated, was based on the requirement that the bank must maintain confidentiality in its transactions that is why it requires proper identification of a person seeking information about an account.
14. The 2nd Defendant gave evidence. He conceded that there was an extension of the facility as pleaded by the Plaintiffs. He admitted that he still owed the 1st Defendant money and that he gave the bank a plan on how he was going to repay the loan. He maintained that the late Jane Wanjiru Kagunda was present when the overdraft facility was executed. He stated that the late Jane Kagunda did not sign the extension of the overdraft facility since it was a renewal of an existing facility. He maintained that he continued to repay the loan but denied being issued with a notice by the 2nd Defendant of its intention to sell the Suit Property. The bank changed the facility from a loan to an overdraft. It was his evidence that he decided to change the loan to an overdraft facility since he had many loans with other banks so that he could pay off the interest on the loan account. He blamed the Plaintiffs for going to the 1st Defendant and demanding the return of the title document over the Suit Property arguing that this is what made the bank refuse to renew the overdraft facility which adversely affected his business and payment of the loan.
15. The 3rd Defendant's witness stated that he attended the auction held at the Kiambu General Post Office on 14/9/2011 and bid for the Suit Property. He emerged the highest bidder and paid Kshs. 6.3 million on the same date. He stated that they were given a memorandum of sale of property on 15/9/2011 and later paid the balance of Kshs. 8.9 million. They paid the stamp duty and other fees amounting to Kshs. 612,040 on 9/2/2012 and title over the Suit Property was issued in the 3rd Defendant's name. He produced a copy of the letter dated 26/10/2011 written by the 1st Defendant's advocate forwarding the completion documents together with a copy of transfer by chargee in exercise of power of sale which was registered on 10/2/2012 and the copy of the title issued on 9/2/2012 in the 3rd Defendant's name. He also produced copies of documents confirming the transfer of funds to the 1st Defendant made on 14/9/2011 and 11/10/2011.
16. Parties filed submissions. The main issue for determination is whether a valid sale of the Suit Property took place. The Plaintiffs maintain that the purported auction of the Suit Property was unlawful as it contravened the law of Succession Act. The Plaintiffs relied on Sections 45 and 82 of the Law of Succession Act. Section 45 prohibits a person from taking possession, disposing off or otherwise intermeddling with any 3 property of the deceased person.
17. Section 82 of the succession Act outlines the powers of personal representatives which include the power to sell or otherwise turn into

account part of the assets vested in them subject to any limitation imposed by the grant. The proviso to Section 82(b) states that no immovable property shall be sold before the confirmation of the grant. Section 66 of the succession Act gives a guide of the order of preference of the persons to whom the court can make a grant of letters of administration when a deceased died intestate. Creditors such as the 1st Defendant rank fourth after the surviving spouse, other beneficiaries and the Public Trustee. As a creditor, the 1st Defendant could have applied for grant of letters of administration over the estate of the chargor, the late Jane Wanjiru Kagunda to enable it realise the Suit Property.

18. The 1st Defendant submitted that it issued a demand on 29/12/2009 indicating that there was default and requiring the regularisation of the account. It contended that it also issued a statutory notice on 22/7/2010 to the Plaintiffs demanding payment of Kshs. 6,944,590 while giving the Plaintiffs three months to make payment failing which it would exercise its statutory power of sale. It argued that the Plaintiffs approached it under the guise of being administrators of the estate of the late Jane Wanjiru Kagunda and obtained a waiver of interest of Kshs. 2 million as well as a deferment of the public auction from 14/7/2011 when it was first scheduled to take place.

19. The 1st Defendant argued that the Plaintiffs are estopped from denying that they had capacity to receive the Statutory Notice since the 1st Defendant acted on their representation when granting them the waiver on the loan of Kshs. 2 million and deferring the public auction. It further argued that the Plaintiffs did not dispute the fact that the loan secured by the charge and further charge had not been repaid in full hence the exercise of its statutory power of sale cannot be challenged.

20. The court finds that the auction carried out on 14/9/2011 on the 1st Defendant's instructions was in contravention of Sections 45 and 82 of the Law of Succession Act, the chargor, Jane Wanjiru Kagunda having died on 27/7/2009 and the letters of administration over her estate not having been confirmed as at 14/9/2011 when the Suit Property was disposed of at the auction. The Plaintiffs were appointed administrators of her estate vide letters of administration issued on 2/8/2011 which were confirmed on 31/7/2012.

21. An order is issued cancelling the 3rd Defendant's title over L.R. No. Ndumberi/Ndumberi/1234. The Plaintiff is awarded the costs of the suit to be borne by the 1st and 2nd Defendants jointly and severally.

Dated and delivered at Nairobi this 12th day of September 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Wabuge for the Plaintiffs

Mr. Nyaburi for the 1st Defendant

Mr. Onindo for the 2nd Defendant

Mr. Baiya for the 3rd Defendant

Mr. V. Owuor- Court Assistant