



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 49 OF 2011

JOSEPHINE NYABONYI..... PETITIONER

VERSUS

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

NIXON ODHIAMBO OKUMU

T/A JONI CONSULT AUCTIONEER.....2ND DEFENDANT

ISMAEL NYABUTI JOSEPH.....3RD DEFENDANT

J U D G M E N T

1. The 1st respondent Agricultural Finance Co-operation took a charge over **LR Central Kitutu/Daraja Mbili/2309** (hereinafter referred to as “**the suit property**”) to secure a loan facility advanced to the petitioner, Josephine Nyabonyi Marionga amounting to kshs. 200,000/= during the year 2008. The petitioner defaulted in the repayment of the loan and the 1st respondent in exercise of its power of sale conferred under the charge and statute sold the suit property through public auction at which the 3rd respondent purchased the property and had the same transferred to his name. The 3rd respondent following the purchase of the property at the public auction and transfer of the property to his name sought to have the petitioner who was in possession to vacate and to deliver vacant possession to him.

2. The petitioner filed the present petition on 28th July 2011 and while she admitted having been advanced loan money by the 1st respondent she denied any demand to pay the loan and/or notice to redeem the property had been made or given to her. She stated that it was on 27th April 2011 that she accidentally came across a poster that had been pinned on the notice board at District Commissioner’s Office, Kisii announcing that the suit property would be sold by public auction on 17th March, 2011 that had already passed.

3. The petitioner averred that upon making enquiries and searching the records at the lands office, she on 4th July 2011 discovered that her property had been transferred to the 3rd respondent. She vide the petition contended that the 1st and 2nd respondents never issued to her any statutory notice nor did they give her the mandatory 45 days to redeem her property as the law requires. She further averred that she was never notified of the intended sale by public auction on 11th March 2011 and that even paid a sum of kshs.19,000/= to the 1st respondent which was acknowledged without any indication that there was a public auction sale for the property that was scheduled on 17th March 2011. The petitioner further averred that the 3rd respondent on 8th July 2011 gave her 30 days notice to vacate the suit property and that necessitated the filing of the present petition. It is the petitioner’s contention that her constitutional rights were infringed by the respondents by failing to give her the requisite notice to redeem her property.

4. The petitioner in the premises prays for:

(a) A declaration that the sale of LR Central Kitutu/Daraja Mbili/2309 by public auction on 17th March 2011 was irregular, unlawful, null and void and was in contravention and infringement of the petitioner’s constitutional rights.

(b) General damages and an order inhibiting the 3rd respondent’s title until the petition is heard and determined.

(c) A permanent injunction do issue restraining the 3rd respondent from evicting the petitioner from the suit property until the petition is heard and determined.

(d) Costs.

5. The petitioner filed the petition simultaneously with a notice of motion seeking an inhibition to be placed against the title of the suit property until the suit was heard and determined. The application also sought an order of injunction restraining the 3rd respondent from evicting the petitioner from the suit property. This application was dismissed by the court on 11th October 2012 after inter partes hearing.

6. The 1st and 2nd respondents filed a reply to the petition on 16th January 2012 where they denied the averments by the petitioner. In particular the respondents pleaded that following the petitioner's default in repaying the loan advanced to her as agreed she was issued a statutory notice dated 28th August 2009 recalling the total outstanding balance being inclusive of arrears and interest. The respondents aver that even though the petitioner acknowledged receipt of the statutory notice and made repayment proposals she failed to honour the proposals and on 3rd December 2010 the 2nd respondent was given instructions to realize the security and on 21st December 2010 the 2nd respondent served the petitioner with the requisite 45 days notice to redeem the property. As the petitioner did not redeem the property, the 2nd respondent after the expiry of the redemption notice on 22nd February 2011 advertised the suit property for sale by way of public auction on 17th March 2011. The public auction was held as scheduled and the 3rd respondent was declared the buyer at the auction as he was the highest bidder with a bid of KShs. 1.1 Million. The 3rd respondent was issued with a certificate of sale as required. The 1st and 2nd respondents contended the petitioner's prayers are incapable of being granted as they had been overtaken by events. The 1st and 2nd respondents further averred that the suit was bad in law and disclosed no cause of action and should be struck out and/or dismissed.

7. The 3rd respondent in a brief replying affidavit dated 13th September 2011 opposed the petition and the interlocutory application. He stated he was the registered proprietor of the suit property having purchased the same at an auction on 17th March 2011. He annexed copies of the title issued under his name on 1st July 2011, copy of memorandum of sale issued by the auctioneers on 21st March 2011 and certificate of sale dated 21st March 2011 issued to him following the sale. He averred that as the registered owner of the suit property he had a legal right to possess the same. He asserted he was not privy to any agreement the petitioner may have had with the 1st respondent and contended that the remedies sought by the petitioner could not be granted as they had been overtaken by events.

8. The petitioner and the 3rd respondent on 9th February, 2017 agreed that the petition be determined on the basis of the affidavits and documents on record and submissions to be made on behalf of the parties as the petition merely raised legal issues. The court agreed with the parties that the petition only raised legal issues and oral evidence would be unnecessary. The court directed the parties to exchange written submissions. The petitioner and the 3rd respondent filed their respective submissions on 28th September 2017 and 21st March 2018 respectively. The 1st and 2nd respondents did not file any submissions.

9. Arising from the pleadings and the evidence in the form of documents submitted by the parties and the submissions made on behalf of the parties the following issues stand out for determination:

(i) Whether any constitutional rights of the petitioner were contravened by the respondents as alleged?

(ii) Whether the 1st respondent's right to exercise its statutory power of sale over the charged suit property had accrued, and if so, whether the 1st respondent properly and lawfully exercised the power of sale?

(iii) Whether the 3rd respondent lawfully purchased the suit property at the public auction?

(iv) What reliefs and/or orders should the court grant?

10. The petitioner in the petition alleges his rights under Articles 2, 3, 19, 20, 21, 22, 23, 27, 28, 31, 40, 64, 165 and 259 of the Constitution were violated by the 1st and 2nd respondents when they sold her property by public auction without her knowledge and without serving the requisite notices upon her before the exercise of the power of sale under the charge. The petitioner's submissions were that the petitioner was not served with the requisite notices under Sections 90(1) and 96(1) and (2) of the Land Act, 2012 before exercising the power of sale. It is not apparent why the petitioner invoked the provisions of the Constitution to anchor her suit when there are clear statutory provisions which provided appropriate remedies in case there was non-observance of the law. The petitioner's submissions are also premised on the provisions of the Land Act No. 6 of 2012 which had not been enacted as at the time the transaction took place and would in the circumstances be inapplicable as the Act could not apply retroactively. The law applicable would be the Registered Land Act, Cap 300 Laws of Kenya (now repealed) which was the law in force at the time the 1st respondent sought to exercise its power of sale conferred under the charge. Section 74 of the Registered Land Act provides as follows:

74(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve in the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may-

(a) Appoint a receiver of the income of the charged property;

or

(b) Sell the charged property.

11. The petitioner was the chargor in regard to the suit property and her contention is that she was not served with the requisite statutory notice and was not given notice of the sale by public auction. It is clear therefore the petitioner was claiming there had been contravention of Section 74(1) of the Registered Land Act, Cap 300 of the Laws of Kenya. How does breach or contravention of an express provision of a statute become a contravention of and/or violation of a fundamental right guaranteed under the Constitution? In my view, there can be no basis for the petitioner to contend her fundamental rights as guaranteed under the Constitution had been violated to entitle her to invoke the Constitutional provisions by way of a petition when determination of any complaint she may have had fell squarely within the mandate of the regular civil courts.

12. The Supreme Court in the case of **Communications of Kenya & 5 Others -vs- Royal Media Services Limited & 5 Others [2014] eKLR** held that where it is possible to determine a matter on some other basis, that other forum should be pursued other than the court being petitioned to determine a constitutional issue. After reviewing various provisions of the Copyright Act and Comparative judicial pronouncements the Supreme Court stated:-

258. From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright infringement claim, and it was not properly laid before that court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the appellate court.”

13. In the instant matter, there clearly was no constitutional issue that warranted the court to be petitioned to determine such as a constitutional issue. Parties ought not to disguise ordinarily civil matters as constitutional matters. The charge that the petitioner as chargor entered into with the 1st respondent as a chargee constituted a contract as between the parties and in the event of any breach of any terms of the contract, the remedy lay in a civil action in the civil court and not in the constitutional court. Section 159 of the Registered Land Act provides that:

“Civil suits and proceedings relating to the title to, or the possession of land, or to the title to a lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration shall be tried by the High Court”. (in the instant case the ELC).

14. At any rate a constitutional petition needs to state in precise terms the specific provisions of the Constitution that it is alleged have been violated and in what manner the provisions are said to have been violated. The Constitutional petition by the petitioner in the present case does not satisfy the test in the case of **Anarita Karimi Njeru -vs- R [1979] 1 KLR 1272** where the court held that there was necessity from a person seeking redress for an alleged constitutional violation to be specific as to the right violated and provide particulars of the violation. The court in that case stated as follows:-

“We would however again stress that if a person is seeking redress from the High Court or an order which invokes reference to the constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they alleged to be infringed.”

15. In the present petition, the petitioner has merely set out the provisions of the Constitution she alleges to have been infringed and never indicated which right was infringed and in what manner. The petition definitely fails the test set out in **Anarita Karimi Njeru** (supra) and is therefore unsustainable.

16. The petitioner does not dispute that she had defaulted on the repayment of the loan she was advanced by the 1st respondent. There is evidence that demand for payment was made from the petitioner and a statutory notice was duly given even though the petitioner denies being served with the notice. The suit property was subsequently advertised for sale and was purchased by the 3rd respondent at the public auction. The sale to the 3rd respondent was completed and he was registered as the owner of the suit property following the registration of the Transfer by Chargee. The 3rd respondent acquired the suit property through a public auction and he was entitled to assume that all the necessary procedures had been complied with before the property was put up for sale. The interest in the property passed to him upon transfer and cannot be impugned unless it is proved the property was transferred to him fraudulently and he is shown to have been a party to such fraud. It has not been demonstrated there was any fraud in the sale and transfer of the property to the 3rd respondent.

17. The remedy for the petitioner if any, would have been a claim for damages if she was able to demonstrate to the satisfaction of the civil court, that her property was wrongfully sold by public auction without compliance with the law. The petitioner chose to come to court by way of a constitutional petition, the determination of which is predicated on the evaluation of the constitutional provisions alleged to have been violated to ascertain whether there was any such violation. I have held that there has been no demonstration of any constitutional violation to warrant grant of any of the reliefs sought by the petitioner.

18. This petition is without any merit and I order the same to be dismissed with each party bearing their own costs of the petition.

19. Orders accordingly.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 26TH DAY OF OCTOBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Nyang'acha for Begi for the petitioner

N/A for the 1st and 2nd respondents

N/A for 3rd Respondent

Ruth court assistant

J. M. MUTUNGI

JUDGE