



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CASE NO 218 OF 2014

STEPHEN KIBOWENPLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....DEFENDANT
JUDGMENT

(Chargee's sale by auction; plaintiff declared highest bidder and pays purchase price within time; chargee refusing to transfer the property alleging that the sale was illegal for want of a valuation report; whether such sale illegal; no complaint by chargor; whether chargee entitled not to transfer property; held that chargee has obligation to transfer property upon sale)

1. The facts of this case are not in dispute. One Jeruto Tapkili Tengekyon (not a party to this suit), as owner of the land parcel Lembus/Kiplombe/157 (the suit land) which is land measuring 27.5 hectares, charged the said land to the defendant, Agricultural FINANCE Corporation (herein AFC or the Bank). AFC is a State Corporation established by the Agricultural Finance Corporation Act, CAP 323, and its mandate is to issue loans for agricultural activities. The amount distributed was Kshs. 3,264,000/= . There was default, and AFC, as chargee, offered the said property for sale by public auction and appointed the auctioneering firm of M/s Kolato Auctioneers to conduct the auction. On 5 May 2014, Kolato Auctioneers placed an advertisement in the Daily Nation newspaper that the suit land would be sold by public auction on 27 May 2014.

2. The auction proceeded as advertised and the plaintiff placed the highest bid of Kshs. 5,000,000/=. He was duly declared the purchaser of the property and he promptly paid a deposit of Kshs. 1,500,000/=. It being a requirement that the purchaser must pay at least 25% of the purchase price immediately after the sale. A Memorandum of Sale was duly drawn and executed by the plaintiff as purchaser, and M/s Kolato Auctioneers as agents of the Bank. The balance of the purchase price was to be paid within a period of 30 days, that is on or before the 26 June 2014. On 16 June 2014, before expiry of the 30 days, the plaintiff drew five banker's cheques all totaling to the sum of Kshs. 3,500,000/= in favour of the defendant, which cheques were forwarded the following day by the plaintiff's counsel and received by the defendant. M/s Kolato Auctioneers on the same day, that is 17 June 2014, then issued the plaintiff with a Certificate of Sale, certifying that the suit property has now been sold to the plaintiff.

3. On 26 June 2014, the plaintiff, through his counsels, M/s Konosi & Company Advocates, requested the defendant to forward the title documents together with the discharge of charge, so that they could proceed to transfer the property to the plaintiff. There was no response to this letter. A reminder was sent on 17 July 2014, but again there was no response, and the defendant did not send to the plaintiff the title deed nor the other instruments required to transfer the property to the plaintiff. The failure by the defendant to forward these documents to the plaintiff, so that the plaintiff may become registered as proprietor of the suit land, is what prompted this suit.

4. In the plaint, the plaintiff has asked for the following orders :-

- (a) A declaration that the property in all that parcel of land known as Lembus/Kiplombe/157 passed to the plaintiff at the fall of the hammer on the 27th day of May 2014 and the plaintiff is the legal proprietor of the suit land.
- (b) A permanent injunction restraining the defendant either by itself, its agents, servants, employees, or otherwise howsoever from dealing with all that parcel of land known as Lembus/Kiplombe/157 in a manner prejudicial to the interest of the plaintiff.
- (c) An order compelling the defendant to release to the plaintiff a Discharge of Charge, a Transfer, and all other relevant documents to facilitate the registration of all that parcel of land known as Lembus/Kiplombe/157 in the plaintiff's name.
- (d) Costs of the suit with interest till payment in full.

5. The defendant has not denied that there was default or that the required notices prior to the sale were not issued. Neither does it deny that the sale took place and the property knocked down to the plaintiff. It is also admitted that the plaintiff performed his part of the bargain and paid the purchase price as required. The defendant's witness stated that concerns arose after the sale when they realized that the property was big in size and the purchase price appeared small. They went back to their records and realized that the valuation report used to sell the property was 2 years old. They were then advised by their legal department that there was an illegality as the Bank could not sell the property without a current valuation report. The valuation report said to be the one utilized is dated 11 December 2012 and was produced as an exhibit. Because of this, the Bank returned the purchase price which was rejected by the plaintiff. It is the view of the defendant that it was proper for them to cancel the sale as the same did not reflect the true market value. It is the view of the bank that the sale was illegal for want of a current valuation report.

6. In his submissions, Mr. Rashid Ngaira, for the defendant drew the following issues :-

- (i) *Whether or not the public auction involved the commission of a legal wrong;*
- (ii) *And if the legal wrong was committed, whether or not the plaintiff should be allowed to benefit from an illegality; and*
- (iii) *Whether or not the equity of redemption was clogged.*

7. He submitted that there was a violation of Section 97 (1) and (2) of the Land Act, which among other things requires a valuation of the property before a sale. He submitted that the defendant owes Jeruto Tengekyon a duty of care to ensure that the charge (probably meant "sale") obtains the best price reasonably obtainable at the time of sale. He submitted that the latest valuation was one and a half years before the sale. He stated that from the face of it, the price for which the property was disposed of was not a proper reflection of the current market price and/or forced value. He submitted that this constituted a breach of care imposed upon a chargee by the Land Act. It was submitted that the sale was illegal ab initio. On this point, he relied on the case of **David Gitome Kuhiguka v Equity Bank Ltd (2013) eKLR** and submitted that the said case held that the duty under S. 97 of the Land Act is mandatory. He submitted that the illegality rendered the contract unenforceable. It was his view that the true proposition is that money was paid under a mistake of law and that the remedy of the plaintiff is a refund.

8. He further was of the view that the plaintiff stands to be unjustly enriched under a contract which involves the commission of a legal wrong. On the aspect of unjust enrichment, he quoted a dictum made in the case of **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1943)**, where it was stated as follows :-

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the

money of, or some benefit derived from, another which it is against the conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and now recognized to fall within a third category of the common law which has been called quasi-contract or restitution..."

9. He submitted that the equity of redemption is normally extinguished at the fall of the hammer but he stated that this only applies where there is a valid contract in existence. It was his view that the sale herein was null and void and that the equity of redemption cannot be clogged by a legal wrong. He submitted that this was the holding in the case of ***Givan Okallo Ingari & Another v Housing Finance Company of Kenya Limited (2007) eKLR***.

10. In his conclusion, he submitted that the sale is an illegality and the defendant ought not to be compelled to complete the same and that being an illegal sale, a good title cannot be passed to the purchaser.

Mr. Konosi for the plaintiff drew the following three issues :-

- (i) *Whether or not the public auction involved the commission of a legal wrong.*
- (ii) *And if the legal wrong was committed, whether or not the plaintiff should be allowed to benefit from an illegality.*
- (iii) *Whether or not the equity of redemption was clogged.*

11. It was his position that the plaintiff is a lawful purchaser and that the property in the suit land passed to him at the fall of the hammer. He relied on the case of ***Mbuthia v Jimba Credit & Another (1988) KLR 1*** and ***Russel Company Limited v Commercial Bank of Africa (1986) KLR 633***. He submitted that the defendant cannot lay claim to the property as its interests were extinguished at the fall of the hammer and cannot therefore prevent the transfer of the property. He submitted that Section 99 of the Land Act recognized the plaintiff as the legal owner of the suit property and that the equity of redemption was lost at the fall of the hammer. On this point he relied on the cases of ***Consolidated Bank of Kenya Ltd & Another v Katherin K. Mbiti & Another (2009) eKLR***; ***Ze Yu Yang v Nova Industrial Products Ltd (2003) 1 EA 362*** and ***Bomet Beer Distributors Ltd & Another v Kenya Commercial Bank Ltd & 4 Others (2005) eKLR***.

12. He submitted that the price of Kshs. 5 Million was the best price obtainable and that nowhere has it been claimed that the said price violates Section 97(3) of the Land Act.

13. He submitted that in as much as Section 97(2) requires a valuation, the said law does not provide that failure to undertake the valuation would amount to an illegality. He relied on the cases of ***Simon Njoroge Mburu v Consolidated Bank of Kenya Limited (2014) eKLR*** and ***Michael H.K. Langat v Muigai Commercial Agencies Ltd & 3 Others (2014) eKLR***. It was his view that failure to undertake a valuation could render the exercise of the power of sale as unauthorized, improper or irregular which can be remedied by payment of damages to the Chargor. He was of the view that no illegality arises. He submitted that the case of ***David Githome Kuhiguka v Equity Bank*** is distinguishable to this suit, as in that case, the chargor applied to stop the sale, but in this one, the sale has already occurred.

14. He further submitted that the plaintiff as purchaser is protected by the provisions of Section 99 of the Land Act. He stated that the plaintiff had no notice of the irregularity and is an innocent purchaser for value.

15. On the second issue, it was his view that it is too far-fetched to argue that the sale is an illegality. He submitted that the defendant is trying to create an illegality where none exists. It was his view that what is presented is an irregularity attributable to the defendant. He submitted that a Chargor affected by an irregularity has his remedy in damages against the Chargee.

16. On whether there was a clog on the equity of redemption, Mr. Konosi submitted that the equity of redemption is clogged where a Chargee purports to exercise its power of sale without issuing the statutory notices. He was of the opinion that failure to carry out a valuation report does not clog the equity of redemption. He submitted that in the case of *Simon Njoroge Mburu v Consolidated Bank*, it was held that failure to carry out a valuation report was not fatal in instances where the property has been sold in a public auction.

17. I have considered the issues herein and the submissions of counsel. I take the following view of the matter.

18. First, it is not disputed that the defendant issued all relevant notices leading to the auction sale. There has been no complaint whatsoever from the chargor about any refusal to issue the requisite notices. The only matter that the defendant states it did not comply with, is to conduct a valuation, as required by the Land Act. It is the argument of the defendant that because it did not carry out the required valuation report, it cannot therefore proceed to complete the sale.

19. In my view five broad questions are open for determination.

- (i) *What is the obligation imposed by law with regard to valuation reports ?*
- (ii) *Can an auction sale be set aside for want of a valuation report ?*
- (iii) *Is the purchaser of a sale by chargee protected ?*
 - (iv) *What is the duty of a chargee after the sale ?*
 - (v) *What is the remedy given the facts of this case.*

Issue 1 : What is the obligation imposed by law with regard to valuation reports ?

20. The starting point has to be Section 97 of the Land Act, Act No 6 of 2012 which is squarely in issue in this case and I feel compelled to lay it out in full. It provides as follows :-

Duty of chargee exercising power of sale.

97. (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—

(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and

(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

(4) *It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.*

(5) *A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).*

(6) *The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.*

(7) *Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.*

21. Section 97 above, embodies the duty of care owed to the chargor by the chargee. The duty therein is no more than *"to obtain the best price reasonably obtainable at the time of sale."* Apart from this, there is no other duty imposed. Section 97 (2) requires the chargee to undertake a valuation of the property. The purpose of the valuation is to enable the chargee discharge the duty of care required by Section 97 of the Act. The hypothesis of course is that the valuation report will guide the chargee as to the forced sale value and the price under which such sale may prima facie be taken to be have breached the duty to obtain the best price reasonably obtainable at the time of sale.

22. So, the question to the first issue is, yes, the law does impose an obligation to undertake a valuation report before the sale. But the the same law does not state how current such valuation report needs to be or whether a valuation must be conducted before every other sale, assuming that the first sale aborts. However the Auctioneers Rules, made under the Auctioneers Act, at Section 11 (I) (b) (x), does seem to suggest that a valuation report which is not more than 12 months old prior to the sale is a proper valuation report for purposes of determining the reserve price.

Issue 2 : Can an auction sale be set aside for want of a valuation report ?

23. The question that arises is whether such sale can be set aside for want of a valuation report. Counsel for the defendant cited the case of **David Gitome Kuhiguka v Equity Bank**. The decision cited was in relation to an application for injunction through which the plaintiff therein sought to stop an auction sale that the defendant intended to undertake. Havelock J, was of the opinion that there was non-compliance with the duty to value the property before the sale and issued the injunction.

24. In **Palmy Company Limited v Consolidated Bank (2014) eKLR**, Gikonyo J , while determining an application for injunction, asserted himself as follows on this point :-

"The duty under Section 97 (2) of the Land Act is therefore, a serious legal requirement which will entitle the chargor to apply to court under Section 97 (3) (b) of the Land Act to have any sale based on such breach to be declared void, and the court on the required proof, should declare such sale to be void. That is the onerous nature of the duty."

25. It will be seen that in the above two cases, the chargors had come to court before the sale. The decisions therein are therefore distinguishable to the situation in this case. The position herein is closer to that which the court faced in the case of **Simon Njoroje Mburu v Consolidated Bank** relied on by Mr. Konosi. In that case, the applicant sought an injunction but the sale had already proceeded. One of the grounds upon which he based his application was lack of a valuation report. The court (Havelock J) did not stop the process of transfer of the suit property to the purchaser. He agreed that valuation was a requirement, but given that the sale had proceeded, the remedy of the chargor lay in damages.

26. On my part, I have not seen any provision where the statute specifies that a sale undertaken without a

valuation report shall be set aside. However, under Section 97 (3) (b), of the Land Act, a chargor may apply to have a sale declared void if the price is below 25% of the market value. The suit herein is not by the chargor, who in fact, does not seem to complain about the sale. Neither has any current valuation report of the property been tabled to show that the price of 5 Million would invite a suit for voiding the sale, for being below 25% of the market price. It has not been suggested that the sale herein was fraudulent or in any way hindered the right of redemption of the chargor.

27. I am not of the opinion that where a sale has already taken place, the same must be set aside for want of a valuation report. My opinion is based on two factors. The first is that the lack of a valuation report does not in any way clog the chargor's right of redemption. The second is that the law protects a purchaser, on issue that I will address in issue 3. Matters that affect the exercise of the right of redemption include issuance of the required notices and proper advertisement of the auction sale. If no notice is issued to the chargor, then it will be difficult for him to know that the chargee intends to sell the property and therefore he may not act to redeem the same. If there is no advertisement of the property, or if the advertisement is improper, again the chargor will not know that the property is due to be sold on a certain day, so that if he is minded so to do, he may redeem the property before the sale. It was argued by counsel for the defendant that such sale is an illegality, but to me, the lack of a valuation report is at most an irregularity which ought not to have the effect of setting aside a sale. I cannot go as far as holding that a sale held without a current valuation report is an illegality as suggested by Mr. Ngaira. The lack of the valuation report does not in any way affect the chargor's right to redeem. If the chargor was minded to redeem the property, he would have redeemed it, whether or not there was a valuation report. The only quarrel he may have is that the property has not fetched the proper value, in which case, the remedy ought to be in damages and not in setting aside the sale.

28. On this second issue therefore, I hold that the lack of a valuation report is not by itself ground enough to set aside an auction sale, unless there is proof that the sale was below the 25% threshold, and unless there is exercise by the chargor of the right displayed in Section 97 (3) of the Land Act. There has been no attack by the chargor that the sale falls within the ambit of Section 97 (3) of the Land Act, and I am unable to find the reason why the chargee does not wish to complete the sale.

Issue 3 : Is the purchaser of a sale by chargee protected ?

29. The Land Act at Section 99, offers protection to purchasers of properties sold in the exercise of the chargee's statutory power of sale. It provides as follows :-

Protection of purchaser

99. (1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) *A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.*

(4) *A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.*

30. It will be seen that under Section 99 (2) (c) above, a purchaser is not obliged to inquire, inter alia, into whether the sale is necessary, proper or regular. Under Section 99 (3), the purchaser is protected unless there is fraud, misrepresentation or dishonest conduct on the part of the chargee of which the purchaser had actual or constructive notice. Section 99(4) provides that the remedy of a person affected by an unauthorised, improper or irregular exercise of the power of sale, shall have his remedy in damages against the chargee.

31. The protection offered to the purchaser is quite expansive. I have my own doubts as to the appropriateness of this expansive protection. It will be seen that protection is offered even where there has been no default, where no notice has been issued, where the sale is not necessary, proper or regular. I am not convinced that the principles of justice will still uphold a sale where no statutory notice is issued; or where there has not been default; or where the sale is outrightly fraudulent, only that the purchaser is unaware of such fraud. But that is not in issue here and remains to be the subject for another day. In the circumstances of this case, notice to the chargor is not contested; it is not contested that the sale arose, and neither is fraud nor misrepresentation alleged. The only issue is the valuation report, which it is alleged was not conducted, and my view, which I have already expressed earlier, is that the lack of a valuation report was at most an irregularity. A purchaser will be protected in the face of an irregularity in the sale. It has not been suggested that the plaintiff herein was a party to any fraud or misrepresentation. It follows that the plaintiff, as purchaser, is protected, irrespective of the irregularity by the defendant in not undertaking a valuation report.

32. I am also not of the opinion that the selling price was itself so low as to constitute a fraud, or to invite the principle of unjust enrichment, as argued by counsel for the defendant. In fact I doubt if the principle of unjust enrichment can apply in an open auction sale, just because the purchaser has purchased the property at a bargain. One of the core reasons why persons purchase in auction sales, and not just auctions for land, is so as to get a good deal. If this were not so, they would simply go to the open market and negotiate a purchase. One cannot be faulted for having bought a property cheaply at an auction. He cannot be said to have become unjustly enriched. He cannot be denied the benefit of his lucky day. Be as it may, the last valuation, conducted about a year and a half to the sale, placed the market value at kshs. 5, 500,000/=. The forced sale value at that time was Kshs. 4,000,000/=. The property fetched Kshs. 5,000,000/= in the auction. Even if there was an increase in the price, I do not think that the increase would be so much as to make the sum of kshs. 5,000,000/= be considered a fraud. The sale was not a private sale, but a sale by public auction, and I believe that the prices offered at the auction, were the prices which reflect the demand for the property. The arguments by the defendant's witness and defence counsel that "on the face of it", the property fetched a very low price, is not backed up by any evidence. The valuation report earlier conducted in fact negates these assumptions.

Issue 4 : What is the duty of the chargee after a sale ?

33. The sale by chargee must be regarded as any other sale of property. The effect of any sale is to transfer property to the purchaser, and this is no different with regard to a sale by chargee. In ordinary sales of property, the sale is embodied in a sale agreement which sets out the obligations of the seller and purchaser. The general obligation of a purchaser is to pay the purchase price as agreed, whereas the general obligation of a seller, is to transfer the property to the purchaser. It is the same in a sale by chargee. The purchaser's duty is to pay the purchase price whereas the duty of the chargee is to transfer the property to the purchaser. In auction sales, there is usually the Memorandum of Sale which acts as the sale agreement. Once the purchaser pays the purchase price, a Certificate of Sale, which is akin to a

certificate of completion, is ordinarily issued. This signals that the purchaser has complied with his obligation and all that is awaited is the transfer of the property by the seller.

34. The core obligation of a seller in an ordinary sale is to transfer the property to the purchaser. It is the same obligation imposed by a chargee after exercising its statutory power of sale. The chargee has a duty to transfer the property to the purchaser or transfer the same to the person assigned by the purchaser. The chargee has no option but to transfer the property. His interest over the property is extinguished upon conclusion of the sale. He cannot unilaterally cancel the sale agreement for he is bound by the contract of sale made with the purchaser. In the same way that an ordinary purchaser of a property can apply for the remedy of specific performance, so too, the purchaser of a property acquired through a sale by chargee.

35. In our case, the chargee has declined to complete the sale and has unilaterally cancelled the same. I am afraid that it has no power to do so. The defendant was bound to transfer the property to the plaintiff as purchaser. I indeed wonder whose interest the defendant seeks to protect, as there has been no complaint by the chargor, who for all intents and purposes, does not appear aggrieved by the sale. The property has already been sold to the plaintiff and I have not seen any circumstance that makes that sale liable to be set aside. If there is an issue about the sale that the chargor will later wish to raise, her remedy will be in damages against the defendant. I am therefore of the opinion that the defendant must abide by its duties as seller and facilitate the transfer of the suit property to the plaintiff.

Issue 5: What is the appropriate remedy given the facts of this case ?

36. There is just one last point that I need to canvass before issuing my final orders. In his suit, one of the remedies sought by the plaintiff is that it should be declared, that upon the fall of the hammer, the property in the suit land passed to the plaintiff, and that the plaintiff is the legal proprietor of the suit land. But I think this may go afoul the provisions of Section 98 (4) which provides that it is upon registration that the interest of the chargor passes to the purchaser. That provision is drawn as follows :-

(4) Upon registration of the land or lease or other interest in land sold and transferred by the chargee the interest of the chargor as described therein shall pass to and vest in the purchaser free of all liability on account of the charge, or on account of any other charge or encumbrance to which the charge has priority, other than a lease easement to which the chargee had consented in writing.

37. It would seem from the above, that property passes upon transfer and registration and not at the time of sale.

38. I believe that I have dealt with all issues in this case. I therefore make the following final orders :-

(i) I issue an order compelling the defendant to release to the plaintiff the title documents, the discharge of charge, transfer by chargee and/or all other documents required for the transfer of the land parcel Lembus/Kiplombe/157 to the plaintiff and further do its part in facilitating the transfer of the suit property into the name of the plaintiff.

(ii) The cheques issued in purported refund of the purchase price be returned to the defendant.

(iii) A permanent injunction is hereby issued restraining the defendant from any further dealings over the property Lembus/Kiplombe/157, save only, for the dealings required to transfer the said property to the plaintiff.

(iv) The defendant shall bear the costs of this suit.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th day of March 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of : -

Mr Biko holding brief for Mr Konosi for plaintiff

Mr J Opande present for defendant

Emmanuel Maelo : Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT AT NAKURU