



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 732 OF 2011**

**SOLOMON NJOROGI KIORE.....PLAINTIFF**

**VERSUS**

**THOMAS NJAAKIO KIMOTHO.....DEFENDANT**

**JUDGMENT**

In a Plaint dated 19<sup>th</sup> December, 2011 the Plaintiff prayed for judgment against the Defendant for:

- a. A declaration that the sale of the property referred to as **Dagoretti/Ruthimitu/552** on 17/2/1997 is void by dint of non-compliance with sections 6 and 8 of the Land Control Act (Chapter 302 of the Laws of Kenya);
- b. A declaration that the Defendant's interest over the property referred to as **Dagoretti/Ruthimitu/552** has been extinguished and the Defendant has no claim whatsoever Dagoretti/Ruthimitu/552;
- c. A permanent injunction against the Defendant, his servants, agents or any person claiming through him restraining them and each of them from interfering with the possession and proprietorship of the Plaintiff the property known as Dagoretti/Ruthimitu/552; and
- d. Costs of the suit.

The Plaintiff avers that until 17/2/1997, he was the registered and beneficial owner of the property known as Dagoretti/Ruthimitu/552 (hereinafter the suit property) which was charged in November 1992 to Post Bank Credit Limited (In Liquidation) to secure a loan of Kshs. 1 Million. In exercise of the Statutory Power of Sale, the bank through M/s Keysian Investments Limited advertised the suit property for sale by auction slated on 17/2/1997 in the East African Standard on Thursday 13/2/1997. As indicated in the advertisement the transaction was undertaken on 17<sup>th</sup> February, 1997 when the suit property was sold to the Defendant for Kshs. 1.5 Million.

It is the Plaintiff's averment that the Defendant failed to comply with the mandatory conditions set out in the Memorandum of Sale prepared by the auctioneer and in that regard, the agreement became void. The Plaintiff claims that the Defendant breached:

- i. Clause 4 whereby he was required to pay Kshs. 375,000/- being 25% upon the sale and the balance of the purchase price within 30 days, but he paid only Kshs. 350,000/- and failed to complete the purchase price.
- ii. Clause 8 by failing to pay rent and other liabilities.
- iii. Clause 10 which required the Defendant to obtain approval of the Land Control Board within 30 days of the date of sale to facilitate transfer of the property.

The Plaintiff further claims that he has been paying Council rates, maintaining the property, preserving the same from encroachers and developing the same for the last 14 years, which actions have significantly increased the value of the property. He contends further that the sale on 17<sup>th</sup> February, 1997 is void on the basis that consent was not obtained. Consequently, that the transfer was not effected and therefore the suit property is registered in the Plaintiff's name subject to the charge of Kshs. 1 Million to the bank. The Plaintiff also stated that the Bank filed suit against the Defendant, **HCCC No. 84 of 1999 Deposit Protection Fund Board as Liquidator of Post Bank Credit Limited (In Liquidation) v Furncon Limited & Solomon Njoroge Kiore** for recovery of the balance owed to the bank after the sale by public auction, but that the said suit was dismissed for want of prosecution.

On the foregoing, it is the Plaintiff's averment, that the bank has no claim whatsoever on the suit property. The Plaintiff also avers that the property is both ancestral and matrimonial land. Further that it has been in excess of 14 years which he has been in possession thereof with knowledge of the Defendant and without interruption. Consequently, that any rights or interests of the Defendant over the property has been extinguished by dint of Limitation of Actions Act.

The Plaintiff avers that his efforts to recover the original title have been futile and that he not being in possession of the title is prejudicial. Further that the title could be altered to his detriment. In that regard, the Plaintiff states that the court should order that a new title be issued to the Plaintiff free of encumbrances, considering the effort put in maintaining the property.

The Plaintiff was granted leave on 8<sup>th</sup> June, 2012 to effect service upon the Defendant by advertisement in the Daily Nation. There is a newspaper excerpt dated 11<sup>th</sup> June, 2012 annexed to an affidavit of service sworn by Melanie Kemunto Lele, Advocate for the Plaintiff on 16<sup>th</sup> July, 2012. The Defendant failed to enter appearance or file a defence following the substituted service. The Court proceeded to enter judgment and directed that the matter does proceed to formal proof. The Court also directed that a second advertisement be placed in the local daily for purposes of notifying the Defendant of the scheduled date for the formal proof. Following the directions, an advertisement was placed in the Standard Newspaper on 10<sup>th</sup> October, 2013.

In compliance with Order 11 of the Civil Procedure Rules, the Plaintiff filed a Witness Statement sworn on 19<sup>th</sup> December, 2011, which he adapted in evidence. The Plaintiff also filed submissions dated 11<sup>th</sup> July, 2014 wherein he reiterated the contents of his pleadings submitting that the Defendant's rights as well as those of the bank had been extinguished for reasons that the bank already disposed of the property through a public auction for Kshs. 1.5 Million. The Plaintiff submitted his allegation is evidenced by the notice in the newspaper advertising the auction, the memorandum of sale dated 17<sup>th</sup> February, 1997 and the admission made by the bank in its pleadings in **HCCC No. 84 of 1999**. The Plaintiff contends that the property having been sold and the consideration been received by the bank, it ceased to have any interests thereon.

As regards the Defendant, the Plaintiff submitted that he acquired rights over the property through auction of 17/2/1997. Consequently, the cause of action to recover land accrued to the Defendant in February 1997 and only available to him for a period of 12 years. Thereby his rights had been extinguished by virtue of **Sections 7 and 17 of the Limitations of Actions Act**, since he had been in occupation thereof with the Defendant's knowledge and without any interruption. It was the Plaintiff's submission that he had earned rights over the property by prescription, having been in occupation and maintaining it by

continuously paying the council rates.

It was the Plaintiff's submission that the sale of the suit property to the Defendant is void by operation of the law and breach of contract, on the basis that first, the Defendant failed to complete the purchase price, and secondly, that suit property being Agricultural property, the disposition was subject to **Sections 6 and 8 of the Land Control Act** as well as the conditions of the Memorandum of Sale.

I have now considered the pleadings and the submissions and it is imperative to point out that the Plaintiff does not dispute the bank's right to exercise its statutory power of sale, neither does he fault the process leading to the sale of the suit property by way of auction. It is also not in contention that the auction was properly advertised and the auction took off as planned. The Plaintiff's disquiet commences at the auction. Therefore, in my view, the issues to be determined are as follows:

- i. **Whether the Defendant acquired rights over the property**
- ii. **If the above is in the affirmative, whether the Defendant's rights over the property is extinguished by operation of the law**
- iii. **Whether the Bank's rights over the property have been extinguished**
- iv. **Whether the Plaintiff has earned rights over the suit property by operation of the law.**

On the first point, it is the Plaintiff's claim that the Defendant acquired rights over the property through the auction. It is however his evidence that the Defendant did not comply with the terms of the memorandum of the sale, and thereby the sale should be declared void. The question is when does the property in the charged land pass to the Defendant in an auction? *Title in the goods, in my view, passes to the purchaser at an auction in terms of the rules of the auction. See Satwant Singh Dhanjal & 2 others v Kenya Revenue Authority Civil Case 1610 of 2001 [2005] eKLR.* The conditions of sale availed by the Plaintiff at Paragraph 4 provides:

**The purchaser shall immediately after the fall of the hammer pay to the auctioneer by cash or by banker's cheque a deposit of 25% of the amount of the purchase price money and sign an agreement in the form annexed hereto for the completion of the purchase, and shall pay the balance of the purchase money to the chargee's advocate within 30 days from the date of the sale which time shall be of essence of the contract to be held in trust pending legal transfer of the property.**

The Plaintiff did also avail a Memorandum dated 17<sup>th</sup> February, 1997 executed by the Auctioneer and the Defendant having been declared a purchaser upon payment of Ksh. 350,000/- and but subject to conditions and the payment of the balance of the purchase price. From the memorandum, it is evident that the 25% of the bid was not paid in full, there is a balance of Kshs. 25,000/-. This court goes by the evidence given by the Plaintiff that the purchase price was in fact not completed. Going by this evidence, it is apparent that the Defendant did not meet the terms of the conditions of sale. Despite the Defendant's execution of the memorandum of sale thereby declaring him a purchaser, failing to meet his obligations thereunder, rendered the sale void. I do find that property in the said land did not pass to the Defendant.

This finding leads to the second issue, as to whether the Defendant's rights to the property have been extinguished by operation of the law. The Plaintiff avers that he has been in open and uninterrupted possession of the property with the knowledge of the Defendant and has continued to pay council rates. It is also claimed that the Defendant acquired rights over the property on 17<sup>th</sup> February, 1997 on which date time started to run against the Defendant and his rights thereto got extinguished at the lapse of 12 years, in accordance with **Sections 7 and 17 of the Limitations Act.**

Section 7 reads:

**An action may not be brought by any person to recover land after the end of twelve years**

**from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.**

Section 17 reads:

**Subject to section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.**

My reading of Section 17 is that adverse possession can only be as against a title holder. Refer to Section 38(1) which gives the adverse possessor an avenue to come to the High Court also provides that such an applicant may apply for an order to be registered as the proprietor in place of the person then registered as the proprietor of the land (Emphasis mine). This court has already made a finding that the rights in the property did not pass to the Defendant. There is nothing to show that the Defendant completed the purchase price or that the property was ever registered in the name of the Defendant. The Plaintiff indeed submits that the title is still registered with the charge to the bank registered in the encumbrance section. Having found that the Defendant did not acquire rights to the property in the very beginning, it is my view, and I do so find, that there would be no rights to be extinguished.

The third issue is whether the bank's rights over the property have been extinguished. The Plaintiff avers that the bank no longer has a claim over the suit property as it already recovered Kshs. 1.5 Million at a public auction and sued for the recovery of a balance of Kshs. 1,692,945.20, which suit was dismissed for want of prosecution. The Liquidator of the bank was not sued alongside the Defendant to enable it respond to all these allegations levelled against it. I also find the Plaintiff to have contradicted himself. On the one hand, it is his evidence that the auction was void because of non-compliance of the terms therein by the Defendant. On the other, he submits that the bank recovered its money from the auction. The Plaintiff places his reliance on a Plaint drafted on behalf of the Liquidator against the Plaintiff's company and his guarantor. The Plaintiff also fails to annex a copy of the court order dismissing the said suit for want of prosecution.

The court did find that the property in the mortgaged land did not pass to the Defendant. Paragraph 6 of the conditions of sale provided that where the purchase failed to pay the balance of the purchase price, the balance would be forfeited to the chargee absolutely and the charge would be entitled to re-sell the property without any notice to the purchaser. The statutory power of sale is a remedy that accrues to the chargor when the mortgage money is due and the after the contractual date of redemption has passed, which, in my view, is not relinquished when an auction sale does not succeed at the fault of the bidder. This court also observes that the Liquidator is not a party to the suit and whereas it has at the very minimum a constitutional obligation to entitle every person to a fair administrative action according to **Article 47 of the Constitution**. A determination as to the rights of the mortgagee of the property can only be made in a situation where it has been afforded an opportunity to make representations over the subject matter.

The last issue is whether the Plaintiff has acquired prescriptive rights therein under the provisions of Limitation of Actions Act. The court's findings on the issues hereinabove answer this question to the negative. This suit was brought against the Defendant which this court has found did not have any rights or interests thereon. The Plaintiff's best bet, in my considered view, is to explore his equity of redemption which, in the circumstances, he is yet to lose. There are a plethora of decisions by both the Court of Appeal and the High Court which affirm the legal position that the equity of redemption of a chargor is extinguished upon it being established that the chargee sold the charged property at in a public auction after the fall of the hammer. See **Patrick Kanyagia vs. Damaris Wangechi & Others CA Civil Appeal No. 150 of 1993.**

The Plaintiff has succeeded to demonstrate to this court that the auction sale was void in so far as the Defendant failed to complete the purchase price, and obtain the relevant consents from the Land Control Board. However, the orders prayed for by the Plaintiff neither sweeps his debt under the carpet nor renounces the bank's statutory power of sale. The court finds that the plaintiff has not proved his case as a

balance of probability and the same is dismissed entirely with costs in the cause. It is so ordered.

Dated, signed and delivered this **11<sup>th</sup>** day of **November** 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk