



Metra Investment Limited v Equity Bank Limited & 3 others (Environment & Land Case 1149 of 2015) [2024] KEELC 1315 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1149 OF 2015**

**J OMANGE, J
MARCH 7, 2024**

BETWEEN

METRA INVESTMENT LIMITED PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

PETER KAMURU KIBERA 2ND DEFENDANT

JOHN MUTHEE NDEGWA 3RD DEFENDANT

STEPHEN NYAMU MBITIWE T/A LIFELINE TRADERS 4TH DEFENDANT

JUDGMENT

1. This suit arises out of a banks exercise of its right to redeem a charged property in this instance Maisonnette A on LR No 209/129182/2 (hereinafter referred to as the suit property). Metra Investments Limited borrowed a loan from the 1st Defendant on 6th February, 2006. The loan was secured by a charge on the suit property. The Plaintiff defaulted in paying the loan which accumulated to Kshs 5,000,000.
2. The 1st Defendant exercised its statutory power of sale. Towards this end an advertisement was placed in the newspapers to sell the suit property. The 2nd Defendant bid to purchase the property at a cost of Kshs 9,600,000. This was the highest bid. He paid a deposit of Kshs 2,400,000 and was issued with a memorandum of sale by Antique Auctioneers who conducted the auction. Under terms of the memorandum the purchaser was to pay the balance by 5th July, 2007.
3. On the 12th July, 2007, the 1st Defendant wrote a letter to the 2nd Defendant cancelling the sale on the grounds that the 2nd Defendant was under the mistaken impression that he was purchasing all three maisonnettes on LR 209/129182/2 instead of Maisonnette A only. In response to the letter of cancellation, the advocate representing the 2nd Defendant offered to purchase by way of private treaty,



maisonnette A at a cost of Kshs 5,000,000. This offer was accepted by the 1st Defendant who then transferred the suit property to the 2nd Defendant.

4. In the same month, on the 23rd August, 2007, the 2nd Defendant sold the suit property to the 3rd Defendant at a cost of Kshs 6,600,000. The Plaintiff's tenant who had a lease agreement with the Plaintiff continued to occupy the suit property and remit the rent to the Plaintiff. Matters came to a head when the 4th Defendant acting on instructions of the 3rd Defendant sought to levy distress on the tenant Lucy Njogu.
5. The Plaintiff filed a Plaint in Court and an application seeking interim relief. The Court allowed the application and issued an order restraining the Defendants from levying distress upon Lucy Njogu. The Court also ordered that rental income from the tenant be deposited in a joint interesting earning account
6. On the 15th March, 2021 a partial mediation agreement was recorded which settled the claim of the Plaintiff against the 2nd, 3rd and 4th Defendants. The outstanding issue that was left for determination by the court was the 1st Defendants Counterclaim against the Plaintiff for the sum of Kshs 892,368.
7. The matter then proceeded for hearing of the main suit in which the Plaintiff had vide an amended plaint dated 18th December, 2022 sought the following orders;
 - a. A declaration that the Plaintiff is the rightful proprietor of Masonette no A built on part of that parcel of land known as LR 209/12918/2 Kileleshwa and an order for re-transfer of the same to the Plaintiff and an account of all their dealings with the same.
 - b. An injunction against the Defendant against any interference with the Plaintiff's right to possession and the right to quiet possession by any tenant or agent of the Plaintiff.
 - c. Damages for trespass and nuisance by the first Defendant.
 - d. Loss of Kshs 4,600,000/-.
 - e. Costs.
 - f. Interest.
8. On their part the 1st Defendant vide a Further amended Defence dated 22nd February, 2023 praying for the following orders:-
 - a. The Plaintiff's suit be dismissed.
 - b. Payment of the sum of Kshs 892,368.10 to the 1st defendant being the outstanding balance of the loan amount together with interest thereon at the rate of 18% p.a and penalty on late payment at the rate of 6% p.a with effect from 16th December 2008 till payment in full.
 - c. Costs of this counterclaim and interest thereon.
9. The Plaintiff's witness Rahab Mukiyama told the court the Plaintiff sought a loan facility from the 1st Defendant and secured it using Maisonnette A which was on the Land Reference 209/12918/2. The loan fell into default. It was her evidence that they agreed with the bank that the property was to be sold at an amount of Kshs 9.6 million of which the bank was to recover the loan of Kshs 5 million and give the Plaintiff the balance. It is the Plaintiff's case that the bank secretly sold the suit property to the 2nd Defendant at Kshs 5 million without consulting the Plaintiff and thereafter failed to provide any accounts. The bank is also still claiming an amount of Kshs 892,368 and interest from the Plaintiff. The



- Plaintiff admits that they had relinquished their rights to the property in favour of the 3rd Defendant who they allege was also duped by the 1st Defendant.
10. The 1st Defendant called one witness Mary Gatonye who confirmed that maisonette A was charged to secure the loan facility advanced to the Plaintiff. After the Plaintiff defaulted the 1st Defendant exercised its statutory power of sale. She told the court that the auctioneer made a mistake and advertised all three maisonnettes in LR 209/12918/2 for sale. This mistake was repeated in the memorandum issued to the 2nd Defendant after the auction. The bank realized this and notified the 2nd Defendant of the cancellation of the sale due to this mistake. In response the firm of Waweru Gatonye which was acting for both the bank and the 2nd Defendant made an offer to the 1st Defendant to purchase Maisonnette A for Kshs 5 Million. The bank accepted this offer and transferred the suit property upon receipt of Kshs 5 Million. The proceeds were used to offset the Plaintiff's outstanding loan with the 1st Defendant leaving a balance of the loan unpaid. Interest continue to accrue. The witness insisted that the 3rd Defendant is unknown to the bank.
 11. Counsel for the Plaintiff referred the court to Section 77 (1) of the [Registered Land Act](#) which provides; " A charge exercising his power of sale shall act in good faith and have regard to the interests of the charger, and may sell or concur with any person in selling the charged land, lease, or charge, or any part thereof, together in lots, by public auction through a licensed auctioneer for a sum payable in one amount or by installments subject to such reserve price and conditions of sale as the charge thinks fit with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby and may himself bid at any auction".
 12. The Plaintiff argue that the 1st Defendant did not act in good faith. The Plaintiff points out a number of procedural irregularities; Firstly, that the 1st Defendant unprocedurally cancelled the sale by public auction in which the 2nd Defendant had offered an amount of Kshs 9.6 million. Following this the 1st Defendant without any consultation sold the suit property at an amount of Kshs 5 million which was lower than the value of the Property which according to a valuation report produced by the Plaintiff was valued at Kshs 9 million far below the price at which the suit property was finally sold at.
 13. In the end the Plaintiff submitted that the court should find that the sale was illegal and hence could not pass good title to the 2nd Defendant. If not the Plaintiff's argue that the Plaintiff is entitled to damages and costs of the suit.
 14. Counsel for the 1st Defendants submitted that the sale by auction was cancelled due to a mistake in the description of the property and a communication issued to the 2nd Defendant which was copied to the Plaintiff. Counsel submitted that the 1st Defendant acted in good faith by accepting the offer to purchase the suit property and that the proceeds were deposited in the loan account leaving the Plaintiff owing a balance which is the basis of the counterclaim which the counsel argued had been proved.
 15. I have considered the pleadings, the evidence adduced by both parties and the submissions filed by both counsel. The court identifies the following issues for determination; Whether the public auction sanctioned by the 1st Defendant was fraudulent? Whether the Plaintiff is entitled to loss of Kshs 4,600,000? Whether the 1st Defendant is entitled to payment of Kshs 892,368 together with interest at 18% per annum from 16th December, 2008 and a penalty for late payment? Who should pay the costs of the suit?
 16. On the issue of fraud, it is the Plaintiff's case that the 1st Defendant acted fraudulently. The particulars of fraud as itemized in the amended plaint are that



- i. the 1st Defendant pretended that the 2nd Defendant was of the erroneous belief that he was buying 3 maisonnettes for the price of one which is ridiculous and incredible.
 - ii. Purporting to reject the sum of Kshs 9.6 million offered by the 2nd Defendant without authority or consent of the Plaintiff to whom it owed a fiduciary duty.
 - iii. Denying that any sale had taken place and proceedings to secretly transfer the property to the 3rd Defendant who then simultaneously charged the same to Barclays Bank of Kenya.
 - iv. Refusing, failing and or neglecting to render an account to the Plaintiff despite demands to do so.
 - v. Failing to issue the requisite statutory or any notice at all after cancellation of the agreed sale to the 2nd Defendant for Kshs 9.6 million.
 - vi. Pretending that the Plaintiff's tenant is the 3rd Defendant's tenant and instructing auctioneers to levy auctioneers despite demand for disclosure of all the transactions involving the property and notice of the illegality of the demand for rent.
 - vii. Refusing failing and or neglecting to furnish the Plaintiff with the particular of the two sales of its property despite demand to do so.
 - viii. By accepting to devalue the property and accepting a less amount of Kshs 5,000,000 instead of Kshs 9,600,000.
17. Fraud is defined by *Black's Law Dictionary* as 'A' knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. From this it can be deduced that elements of fraud are intentional misrepresentation; knowledge of the falsehood; reliance on the fact and damage as a result. The court has to be convinced that in the facts of this case the actions of the 1st Defendant satisfy all four elements.
18. The Plaintiff's case against the Defendant stems from the complaint that the 1st Defendant was offered in a public auction an amount of Kshs 9,600,000 for the suit property but mysteriously ended up accepting an amount of Kshs 5,000,000 in an opaque process in which she was not involved. The 1st Defendant on their part contend that the Kshs 9,600,000 was offered on the basis of a mistake which had resulted in the advertisement of three maisonnettes for sale instead of the one which had been charged. The bank insists that this was a genuine mistake and once it realized the mistake it took steps to cancel the sale.
19. The Plaintiff is supported in her claim by the memorandum of sale which was forwarded to her by the 1st Defendant vide a letter dated 14th June, 2007 in which she was notified that the property had been sold by public auction at a cost of Kshs 9,600,000. This letter does not indicate the number of maisonnettes that had been sold. It is thus quite easy to understand why the Plaintiff thought the suit property had been sold at the price of Kshs 9,600,000.
20. In support of its claim that there was a material mistake, the 1st Defendant referred the court to a newspaper advertisement contained in the 2nd Defendant's bundle of document and the Memorandum of Sale contained in the same bundle of the 2nd Defendant. It is noted that these documents were not produced as the 2nd Defendant did not testify. Curiously, the 1st Defendant did not find it fit to produce these documents. However, they did produce the letter dated 12th July, 2007 in which they cancelled the auction for mistake. This letter was copied to the Plaintiff who denies receipt of the same.



21. In view of the action taken by the 1st Defendant to cancel the sale, once they belatedly realized the mistake I find that there is a real probability that they had made a genuine mistake. As such intentional misrepresentation which is an essential ingredient for fraud has not been proved. There would be no basis therefore to cancel the sale and order that the property belongs to the Plaintiff. In any event the question of ownership was resolved vide the mediation settlement agreement.
22. On the question of the 1st Defendants counterclaim, it is not in dispute that the Plaintiff had defaulted in repayment of the loan which has arrears of Kshs 892,368 the Plaintiff alleges that the arrears were brought about because of the conduct of the 1st Defendant who after cancelling the sale by auction entered into a sale by private treaty at a cost that was much lower than the value of the suit property. She insists that this was carried out without her knowledge. She pointed out that the fact that the suit property was immediately sold to a third party at a cost of Kshs 6,600,000 is an indication that it was deliberately sold at a price lower than its value.
23. There is no doubt that the banking industry has a huge role to play in driving the economy of any country by ensuring access to credit at reasonable terms. The World Bank ease of doing business recognizes this and has included as one of the indicators for measuring the ranking of a country, how easy it is to obtain credit. The Bank- Customer relationship is critical component in this matrix. This relationship is one which is built on trust. The bank advances credit expecting that it will be repaid. On the other hand, the customer is expected to repay the credit. In instances where the customer defaults the bank is entitled to take steps to recover its loans. A customer who has defaulted on its part expects the bank to take action to recover its investment. At all times both parties expect each other to act in good faith. Wikipedia defines good faith as a sincere intention to be fair, open, honest, regardless of the outcome of the interaction.
24. Was this the case in the present case? Upto the point of cancellation of the sale by auction, there is no evidence that the 1st Defendant did not act in good faith. After this there are more questions than answers. The 1st Defendant in cancelling the sale, copied the Plaintiff in the correspondence. The advocate for the 2nd Defendant who made an offer to purchase by private treaty did not copy the Plaintiff. Neither did the 1st Defendant copy the Plaintiff in on any further correspondence. Neither was any evidence produced to show that the 1st Defendant ever briefed her on the terms of the sale.
25. It is also not possible to say with certainty that this was the best possible price that could have been obtained for the suit property. The 1st Defendant did not produce any valuation report to demonstrate that the Kshs 5,000,000 was the best price that could have been obtained in the open market for the suit property. The lack of sincerity and opaqueness with which this sale was carried out and which was the basis of the complaints of fraud by the Plaintiff, even if they do not amount to fraud are evidence of bad faith.
26. I find that it is highly probable that 1st Defendants actions contributed to its failure to offset the full amount of loan owed by the Plaintiff. He who comes to equity must come with clean hands. In this instance the 1st Defendants hands are at best muddled. I find that they are not entitled to the amount claimed in the counterclaim, which claim is hereby dismissed.
27. I have considered the Plaintiff's claim for loss of Kshs 4,600,000 I note that as part of the mediation settlement that the Plaintiff reached with the 2nd and 3rd Defendant they relinquished their claim for the rental income of Kshs 3,905,000 she had collected in the period 2008 and 2015. Further, she received Kshs 2,800,000 rental income which had been deposited in a joint interest earning account. These amounts no doubt recouped the loss the Plaintiff had suffered from the sale. As such I will not award the claimed amount.



28. On the question of costs, the actions of the 1st Defendant resulted in the filing of this suit and it is only just that he meets the costs of the Plaintiff both for the main suit and the counterclaim.

29. It is ordered accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF MARCH 2024.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Ndolo advocate for the Plaintiff

Mr. Mutua advocate for the Defendants

Steve - Court Assistant

