



REPUBLIC OF KENYA



KENYA LAW
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**Mehta v Kenya Commercial Bank Limited & 2 others (Civil Appeal
5 of 2020) [2022] KECA 743 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KECA 743 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 5 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JULY 29, 2022**

BETWEEN

MOSES MBUGUA MEHTA APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED 1ST RESPONDENT

FAIZA ABDALLAH SALID AL ARMY 2ND RESPONDENT

WARDA A SAID AL ARMY 3RD RESPONDENT

*(An appeal against the judgment/decree of the Environment and
Land Court at Mombasa (Omollo, J.) dated 27th November 2019
in ELC Civil Case No. 440 of 2017 Consolidated with 226 of 2015)*

JUDGMENT

1. In its judgment, the subject of this appeal, dated 19th November 2019 and delivered on 27th November 2019, the Environment and Land Court (ELC) (A. Omollo, J.) dismissed the appellant's claim seeking a declaration that the sale and transfer of a property known as L.R. No. MN/1.14414 (C.R. 42081) Shanzu Mombasa (the property) by the 1st respondent (the bank) in exercise of its statutory power of sale was unlawful and illegal. In the same judgment, the court upheld the 2nd and 3rd respondents' title to the property; ordered the appellant to vacate the property and hand over possession to the 2nd and 3rd respondents within 60 days from date of the judgment; and ordered the appellant to pay to the 2nd and 3rd respondents' mesne profits of Kshs. 80,000 per month from 10th February 2017 until the time they get possession of the property.
2. The facts, as established by the trial court are that appellant applied for, was offered, and granted a mortgage facility of Kshs. 7,650,000 by the bank. The facility was secured by an instrument of Legal Charge dated 19th October 2009 in respect of the property which was then registered in the appellant's



- name. The appellant defaulted in the repayment of the facility and having served the requisite statutory notices on the appellant, the bank sold the property by public auction held on 20th December 2013 for a price of KShs. 12,000,000.
3. The purchasers at the auction were two brothers, Fawzy Abdallah Brek and Fuad Abdallah Brek in whose favour the bank as chargee, executed a transfer and the property became registered in their names on 13th January 2014. Later, Fawzy Abdallah Brek and Fuad Abdallah Brek transferred the property to their respective wives, Faiza Abdallah Said Al-Amry and Warda A. Said Al-Amry, the 2nd and 3rd respondents respectively, and a transfer in their favour was registered on 11th July 2014.
 4. Meanwhile, on 7th January 2014, the appellant commenced suit before the Land and Environment Division of the High Court at Nairobi in Civil Suit No.5 of 2014 against the bank contending that the purported sale of the property on 20th December 2013 was fraudulent, unlawful and illegal because notice of statutory sale as required by law was not given and that the appellant “was not in gross arrears” to warrant the exercises of the power of sale.
 5. The particulars of “fraud, unlawful and illegal sale” pleaded by the appellant were that the property was sold without the mandatory statutory notice of sale; there were no arrears of the mortgage repayment to warrant the sale; the sale was carried out despite the appellant having paid KShs. 1,000,000 on 17th December 2013; and that the respondent failed to communicate with the appellant. He sought orders of injunction to restrain transfer of the property and a declaration that the sale was unlawful and illegal and for the setting aside of the sale. The bank filed a defence dated 28th January 2014 denying that the sale was illegal or unlawful.
 6. As Civil Suit No.5 of 2014 was pending before the Land and Environment Division of the High Court at Nairobi, on 14th September 2015 Faiza Abdallah Said Al-Amry and Warda A. Said Al-Amry filed suit against the appellant before the ELC at Mombasa being ELC Case No. 226 of 2015 in which they averred that as registered owners of the property in possession, the appellant had in the month of August and September 2015 unlawfully entered and trespassed on the property; that on 11th September 2015, the appellant with the assistance of police officers from Bamburi Police Station Mombasa raided the property and forcefully and unlawfully occupied the house on the property. They sought orders against the appellant to restrain him from trespassing on the property; a mandatory injunction ordering the appellant to vacate the property and general damages for trespass. The plaint in that suit was subsequently amended to incorporate a claim for mesne profits.
 7. Civil Suit No.5 of 2014 was transferred to the ELC Mombasa and assigned case number ELC 440 of 2017 and by an order made on 14th December 2019, ELC 440 of 2017 and ELC Case No. 226 of 2015 were consolidated, with ELC 440 of 2017 as the lead file. The consolidated suits were heard before Omollo J. The appellant and his wife Elizabeth Mwihaki Kariuki testified for the appellant. Kennedy Kasamba, a recovery manager testified for the bank while Fuad Abdallah Brek, testified on behalf of the 2nd and 3rd respondents.
 8. Having heard the evidence, the learned Judge framed the following issues: Whether the appellant had defaulted in the loan facility at the time of the advertisement and subsequent auction; whether the requisites statutory notices were served on the appellant before the auction; whether the appellant established fraud against the respondents; which of the two claims should succeed; and who should bear the costs of the suits. The judge made findings that: the appellant admitted that there was default in repayments of the loan and the bank was therefore at liberty to realize the security; that statutory notices were issued and served in accordance with the provisions of the legal charge; and that the appellant did not establish his claim with the result that it failed and was dismissed.



9. On the other hand, the Judge found that the 2nd and 3rd respondents had demonstrated that they purchased the property and acquired title after due process was followed and are entitled to vacant possession and peaceful enjoyment thereof. Their claim for mesne profits in the amount of Kshs. 80,000 per month was allowed with effect from 10th February 2017, being the date when they amended their plaint to incorporate that claim; and the appellant was given 60 days from the date of judgment to vacate.
10. Aggrieved, the appellant lodged this appeal on grounds that the Judge erred in: failing to consider his evidence and in dismissing his claim; misdirected herself in finding that the appellant was served with statutory notice of sale when there was no evidence to support the finding; failed to consider requirements of Section 96(2) of the *Land Act*; failing to find that no valuation of the property was carried out and in speculating that valuation was done; failing to consider the doctrine of lis pendens; and in awarding mesne profits of Kshs. 80,000 without evidence to warrant that award.
11. During the hearing of the appeal before us, learned counsel Mr. Njoroge Wachira appeared for the appellant. Ms. Anne Mathenge, learned counsel, appeared for the bank, while Mr. Francis Mwakireti, learned counsel appeared for 2nd and 3rd respondents. Mr. Wachira relied on the appellant's written submissions dated 23rd September 2021 which he highlighted orally.
12. Counsel submitted that the respondents had the burden of proof to establish that the requirements as to service of statutory notices as set out at Section 96 of the *Land Act* were fulfilled; that the appellant and his wife denied having received the statutory notices and it was not established that they were served; and neither was the Auctioneer called as a witness to give evidence as to how he conducted the alleged auction and how he complied with Rules 15(b) and (e) of the *Auctioneers Rules*, 1997; that no evidence was led and it was not established that a valuation of the property was undertaken as required by Section 97 of the *Land Act*; that in effect there was no proper legal sale of the property and no auction took place on 20th December 2013; and that an unlawful process is incapable of conferring any title or proprietary right to a successful bidder.
13. Citing the case of *Mawji vs. US International University and another* (1976) KLR 185 counsel submitted that the doctrine of *Lis Pendens* applied; that the witness for the 2nd and 3rd respondents, Faud Abdalla Brek acknowledged in his testimony that in 2014 there was a pending case with the appellant; that on 7th March 2014 a caveat was lodged with the Registrar of Titles Mombasa to prevent dealings with the property and the property should not have been transferred to the 2nd and 3rd respondents while the suits were alive. It was submitted further that the speed at which the property was transferred to the 2nd and 3rd respondents in July 2014 during the pendency of litigation confirms that there was fraud.
14. As regards the award of mesne profits, counsel submitted that the appellant was always in possession of the property; that there was a court order issued on 13th March 2014 for maintenance of status quo which was fortified with an order on 31st March 2014 for the status quo to continue; that those orders were never set aside during the currency of litigation before the lower court; that the appellant was therefore lawfully in possession of the property until the court decreed otherwise in its impugned judgment; that in the circumstances, the Judge could only award mesne profits after pronouncing and delivering the judgment and the award could only relate to the period post judgment as the appellant's occupation was hitherto lawful. With that, counsel urged the Court to allow the appeal.
15. Opposing the appeal, learned counsel Ms. Mathenge relied on the bank's written submissions dated 18th March 2022 filed by the firm of Kale Maina & Bundotich Advocates. It was submitted that the appellant was undoubtedly in default of the loan repayments which led to the exercise of the statutory



power of sale under the legal charge; that under clauses 9 of the legal charge and 16 of the letter of offer, the chargee's right to exercise its power of sale in the event of default by the chargor was reserved; that the appellant acknowledged having failed to pay instalments for the period January, March and 20th April to 20th September 2013 and was in arrears of up to Kshs. 1,200,000 at the time of sale; that evidence was led that demonstrated that statutory notices and notification to sell were issued in accordance with Sections 90 and 96 respectively of the *Land Act*, the property advertised and sold at a public auction; that the appellant belatedly attempted to settle the arrears.

16. It was submitted that even though the appellant pleaded fraud, it was not proved. The case of *Moses Parantai & Peris Wanjiku suing as the legal representatives of the estate of Sospeter Mukuru Mbeere vs. Stephen Njoroge Macharia* [2020] was cited for the proposition that a party alleging fraud has the onus to prove it and the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & another* [2000] eKLR for the proposition that fraud must be distinctly alleged and distinctly proved and that it is not allowable to leave fraud to be inferred from the facts.
17. It was submitted that by the time Civil Suit No. 5 of 2014 (ELC 440 of 2017) was filed on 7th January 2014, the property had already been sold on 20th December 2013 and by the time an order for maintenance of status quo was made by the court on 13th February 2014, the property had already been registered in the names of the purchasers on 13th January 2014 and the doctrine of lis pendens was therefore not applicable.
18. Learned counsel for the 2nd and 3rd respondents Mr. Francis Mwakireti in opposing the appeal relied entirely on written submissions 15th March 2022 filed by the firm of Mwakireti & Asige Advocates in which it was submitted that the trial court properly found, based on the evidence, that the appellant defaulted in payment of the loan and that the right to sell the property had accrued and was exercisable under the charge; that evidence was led to show that the requisite statutory notices under Section 90 of the *Land Act* were issued; that the claims of fraud by the appellant were not proved. In that regard reference was made to the case of *Nancy Kahoya Amadiva vs. Expert Credit Limited & another* [2015] eKLR for the argument that fraud must be specifically pleaded and distinctly proved on a standard beyond that of balance of probabilities.
19. It was submitted that under Section 99 of the *Land Act*, a bona fide buyer of a property sold in exercise of statutory power of sale has statutory protection; that the purchasers in this case were bona fide purchasers for value and bought the property in good faith without any fraud, misrepresentation or any other dishonest conduct on their part.
20. We have considered the appeal and the rival submissions and have, in keeping with our mandate, reviewed and re-evaluated the evidence with a view to reaching our own conclusions bearing in mind that we lack the advantage the trial court had in hearing and observing the witnesses as they testified. As held in *Selle and another vs. Associated Motor Boat Company Limited and others* [1968] 1 EA 123, the mandate of this Court on a first appeal is to:

“...reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”



21. With that in mind, there are three issues for determination in this appeal. The first is whether it was established that the bank's right to exercise its statutory power of sale had accrued and was exercisable. In that regard there is the question whether the Judge was right in finding that statutory notices were served. The second issue is whether the appellant established, to the required standard, that the sale of the property by the bank was fraudulent. The third issue is whether the Judge erred in upholding the 2nd and 3rd respondent's title to the property and in awarding mesne profits.
22. As to whether it was established that the bank's right to exercise its statutory power of sale had accrued and was exercisable, it is not in dispute that by an instrument of legal charge dated 19th October 2009, the appellant charged the property to secure a loan of Kshs. 7,650,000 whose purpose, as set out in the letter of offer, was to "complete purchase of a residential properties on L. R. No. MN/1/14414 (C.R. 42018)-Shanzu-Mombasa". It is also not in contention that under clause 19 of the Charge, the bank was conferred with the power of sale of the property in the event of default by the appellant.
23. In his testimony under cross examination on 13th February 2019, the appellant conceded that under the terms of the loan facility with the bank, he was required to pay a sum of Kshs. 111, 755 per month. He stated that "20th January 2013-20th March 2013 I did not make payments but I was in constant touch with the bank"; that "20th April- 20th September 13, I had not made any payments". In her testimony, the appellant's wife, Elizabeth Mwhaki Kariuki also conceded that "in early December 2013" she "became aware the loan was in arrears" and that, "we did not raise the whole amount". Moreover, the bank's witness, Kennedy Kasamba, produced bank statements in respect of the appellant's account which also demonstrated that the appellant was in arrears. In view of the evidence, the learned Judge's finding that the appellant, "by his own admission was in default of the loan thus in breach of the contract" between him and the bank and that bank was therefore at liberty, under the charge document, to realize the security is well founded and supported by the evidence.
24. With regard to service of statutory notices, the bank produced in evidence notices dated 18th March 2013 and 29th August 2013 addressed to the appellant titled "chargee statutory notice to sell pursuant to Section 96(2)(3) of the *Land Act...*". In the notice of 18th March 2013, the bank demanded payment of Kshs. 7,750,570.40 which was then outstanding as at 28th February 2013 and gave the appellant three months from the date of service of that notice to pay the said amount. In the second notice of 29th August 2013, the bank demanded payment of Kshs. 8,024,367.35 then outstanding as at 29th August 2013 and notified the appellant that unless payment of the said amount was made to the bank forty days from the date of service of that notice, the bank would commence the sale of the property. Certificates of posting showing that those letters were sent to the appellant at "P. O. Box 1582-00606 Nairobi" were produced.
25. Those notices accorded with clause 13 of the charge instrument which provided that any notice or demand required to be served by the bank on the chargor shall be deemed to have been properly served if sent by registered post in a stamped envelope addressed to the chargor at his last known address. The address to which the notice was sent was the address provided by the appellant in the charge instrument. In his testimony, the appellant conceded that the address to which the letters were sent was his postal address though he maintained he did not receive the notices. Clause 13 of the charge further stipulated that where a notice or demand is sent by registered post, it shall be sufficient prove that the notice or demand was properly addressed and posted. Based on the foregoing, there was evidence on the basis of which the learned Judge correctly found that the statutory notices were served on the appellant.
26. The next issue is whether the appellant established, to the required standard, that the sale of the property was fraudulent. In that regard, the particulars of "fraud, unlawful and illegal sale" pleaded by appellant in his plaint were that the bank sold the property "without issuing the plaintiff with the



mandatory statutory notice of sale”; “selling the house when there was no arrears of the mortgage repayment to warrant the purported sale”; selling the house on 20th December 2013 yet the appellant had deposited Kshs. 1,000,000 on 17th December 2013; and failing to communicate with the appellant at all. There was no plea or averment that the property was either sold without a valuation report or at an undervalue.

27. We have already found that based on the evidence tendered the trial court properly discredited the claims by the appellant that he was not in arrears and that mandatory statutory notices were not issued. For the same reason the claim that the bank failed to communicate with him is not supported by the evidence. On the contrary, it was the appellant’s testimony that he maintained communication with the bank. The debt as at 29th August 2013 when the second demand notice was served stood at Kshs. 8,024,367.35 and the payment of Kshs. 1,000,000 by the appellant on 17th December 2013 hardly dented the debt.

28. As submitted by counsel for the respondents, it is trite that fraud must be distinctly alleged and distinctly proved. As stated by the Court in *Vijay Morjaria vs. Nansingh Madhusingh Darbar & another* (above):

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must

be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

29. We find that the appellant failed to establish fraud on the part of the respondents and we uphold the decision of the trial court in that regard.

30. Next is the question is whether the Judge erred in upholding the 2nd and 3rd respondent’s title to the property and in awarding mesne profits. In that regard the learned Judge expressed:

“From the evidence presented, the plaintiff has not made out a case against the bank (1st defendant) and or the 2nd & 3rd defendants because at the time of the auction he was in arrears of the loan. Secondly, he was duly served with the statutory notices. Thirdly, he never stopped the auction nor the transfer and registration of the suit title in the names of the 2nd and 3rd defendants...on the other hand, the 2nd & 3rd defendants have demonstrated that they purchased the suit property and acquired title after due process was followed. That the 1st defendant executed a transfer in their favour after they paid the entire purchase price which is evidenced in the plaintiff’s bank statements produced...they are therefore entitled to vacant possession of the suit property...”

31. Those findings are well grounded on the evidence that was produced. We have already made reference to the evidence pertaining to default on the loan repayment by the appellant and service of statutory notices thereafter. Save for the unsupported claims of fraud by the appellant which were discounted, it was not disputed that the property was sold at a public auction held on 20th December 2013. In that regard the newspaper advertisements of the public auction; the auctioneer’s certificate of sale and memorandum of sale in favour of the bidders, Fawzy Abdallah Brek and Fuad Abdallah Brek; evidence of payment of the purchase price; and duly registered Transfer by Chargee in favour of the purchasers were produced as exhibits before the trial court. As already indicated, the subsequent assertions by the appellant that no valuation of the property was undertaken prior to the sale; that the property was sold



at an undervalue; and that the transfer breached the principle of lis pendens did not form part of the appellant's pleaded case and appears to have been an afterthought. The transfer of the property from the bidders Fawzy Abdallah Brek and Fuad Abdallah Brek to their spouses, 2nd and 3rd respondents, was not done until some six months later on 11th July 2014.

32. As regards the claim for mesne profits, in their amended plaint dated 10th February 2017, the 2nd and 3rd respondents pleaded that the market recoverable rent was Kshs. 80,000 per month. In support, a valuation report by Joe Musyoki Consultants dated 27th April 2016 which placed the rental value per month at Kshs. 80,000 was produced. There was evidential basis therefore on which the learned Judge awarded that amount as mesne profits. However, in ordering payment of mesne profits "from 10th February 2017 when the amendment was made to include the prayer", the learned Judge does not appear to have considered that there were interim orders of the court during the pendency of the suit on the strength of which the appellant had retained occupation. We think there is merit therefore in the appellant's contention that the effective date should not predate the date of delivery of the judgment which was 27th November 2019. To that extent only, we are inclined to interfere with the judgment of the lower court.

33. In the result, save for the variation that the effective date for the payment of mesne profits is 27th November 2019, the appeal otherwise fails and is hereby dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR

