



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 216 OF 2014**

**BETWEEN**

**STEPHEN BORO GITIHA .....APPELLANT**

**AND**

**NICHOLAS RUTHIRU GATOTO.....1ST RESPONDENT**

**NDARUGU MERCHANTS .....2ND RESPONDENT**

**BURIAL URBAN CREDIT FINANCE (UNDER RECEIVERSHIP).....3RD RESPONDENT**

*(Appeal from the judgment and decree of the High Court of*

*Kenya at Nairobi, (Ogolla, J.) dated 23rd January, 2014*

*in*

***H.C.C.C. NO. 4275 OF 1994)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant **Stephen Boro Gitiha** (Gitiha) attended a public auction on 30th June 1994 at Kiganjo Township and bought a property known as **KIGANJO/KIAMWANGI/208** at the price of Kshs. 750,000. The property was then transferred to him and registered in his name on 7th October 1994.

Gitiha was, however, fated not to enjoy the property peaceably for, by a plaint dated 22nd December 1994 and later amended on 19th September 1996, he together with the auctioneer who conducted the auction Ndarugu Merchants, the Rural Urban Credit Finance Limited (Rural Urban) which gave the instructions, being the 2nd and 3rd respondents, respectively, were sued by Nicholas Ruthiru Gatoto (Gatoto) the 1st respondent. The prayers sought were for an injunction restraining the appellant from trespassing upon or interfering with Gatoto's enjoyment of the property; a declaration that the sale of the property to Gitiha and the subsequent transfer and title issued were a nullity; an order directing the Registrar of Lands Kiambu office, to cancel the title issued to Gitiha and restore Gatoto's title thereto as well as damages for loss of use (sic) of the property and damages.

Gatoto's case was that as the time the property was sold to Gitiha by Rural Urban in exercise of a

statutory power of sale, no requisite notice of the intention to sell the charged property had been issued to Gatoto. The power of sale did not therefore arise and the purported sale was null and void *ab initio* thus incapable of conferring a good title on Gitiha and of extinguishing Gatoto's equity of redemption.

The 2nd respondent, Ndarugu Merchants posited before the High Court that it conducted the auction properly per the Auctioneers Rules then in force and also fetched a good price. This was Kshs. 750,000 that Gitiha paid as the second highest bidder, the highest bidder at Kshs. 760,000 having failed to raise the requisite 25% deposit. Gitiha supported this position and urged that he was an innocent purchaser for value without notice and that the property having been transferred to him, he acquired an indefeasible title and Gatoto's interest in the property stood extinguished leaving him only with a claim in damages.

After perusing the parties' evidence as recorded by Azangalala, J (as he then was) and Njagi, J; and considering submissions by counsel, Ogolla, J in a judgment dated and rendered on 23rd January 2014 found in favour of Gatoto and made the following dispositive orders;

***“(a) That the sale of L.R. Number KIGANJO/KIAMWANGI/208 by the 1st and 3rd defendants to the 2nd defendant and the transfer together with the title deed issued pursuant thereto was illegal and a nullity in law and the same is herewith (sic) cancelled.***

***b. The original charge in respect of the suit property in favour of the 3rd defendant by the plaintiff is hereby restored.***

***c. That the plaintiff has the option to redeem the said property in terms of the said charge.***

***d. The plaintiff's costs for this suit shall be paid by the 3rd defendant. The rest of the parties to bear their own costs.”***

It is those orders that aggrieved Gitahi and led him to file this appeal. Even though the memorandum of appeal raised several grounds of appeal, the brief issues that he calls upon this Court to determine are whether, as posed in his learned counsel's written submissions, the learned Judge erred in holding that;

***“(i) ... there was no service of statutory notice contrary to the evidence.***

***(ii)... non-service of statutory power (sic) invalidates the sale even after transfer had been effected and in the absence of fraud.***

***iii)... the transfer together with the title deed issued to the appellant was a nullity despite finding him innocent purchase for value.”***

Highlighting his written submissions before us, **Mr. Mirie** learned counsel for Gitiha contended that the matter of the statutory notice was never raised as an issue for determination and the learned Judge was therefore wrong to deal with it *in vacuo* and render it determinative of the dispute before him. He asserted that as Gatoto had filed previous suits challenging attempts to sell the property, he was aware of the intention to exercise the power of sale and that the issue of the notice should not at any rate impeach or invalidate a properly-conducted sale. He submitted that by din't of **Section 77** of the Registered Land Act (repealed) the only remedy Gatoto could have would be in damages.

**Mr. Thuku**, learned counsel who appeared with **Ms. Mwhiki** for Gatoto countered those submissions by contending that the issue of the non-issuance of the statutory notice had in fact been pleaded by his client in the amended plaint, which rural Urban responded to in its statement of defence. Moreover, Gatoto stated categorically in his testimony that he was never served with such notice.

The witness called by Rural Urban as **DW3** was unable to produce any evidence that such notice was issued to Gatoto, counsel contended, and as such in the absence of the notice his equity of redemption could not be lost. Citing this Court's decision of

**260)** (CAK) counsel pressed that Rural Urban bore the onus of proving issuance of the statutory notice. Having failed to do so, the sale was invalid and Gatahi could therefore not plead that he was an innocent purchaser. The breach of **Section 74** of the RLA, which obligated issuance of notice was incurable by an award of damages to the chargor. Rather, it is the purchaser who would be entitled to a refund of the consideration.

We have perused the record, the authorities cited by the parties before us, as well as the rival submissions made in their behalf consistent with our duty as a first appellate court to re-evaluate and re-assess the entire evidence and draw our own inferences of fact and make our own conclusions. Having done so, we apprehend that this appeal turns on the question whether a statutory notice was issued to Gatoto before the auction of the suit property was conducted and, if not, the legal consequence of non-issuance.

The record attests that the issue of the notice was raised in the pleadings and featured in testimony. The plaint as amended at paragraph 12(a) stated that one of the particulars of fraud regarding the auction sale was “*failing to give adequate or any notice at all as required by law*” and was answered in Rural Urban’s statement of defence thus;

***“The particulars of fraud are denied and defendant (sic) avers that;-***

***a. That the notice of the auction sale was given as required by law.”***

Both **PW1** and **DW3** testified and were cross-examined on the issue of the statutory notice. It was also raised in the submission filed on behalf of Gatoto as follows;

***“Turning to the issue of service of the statutory notice, it is mandatory under section 74 of the Registered Lands Act that the charge must serve a 3 months statutory notice before exercising its statutory power of sale. Failure to serve the notice implies that the chargor’s power of sale has not arisen and there is nothing to exercise. PW1 stated that he was never served with the statutory notice. DW3 failed to prove that such a notice was ever served. The burden of proof to show proper service of the notice was effected lies with the chargee.***

***The 3rd defendant did not produce any evidence to show that it served the statutory notice in any of the ways provided for under section 153 of RLA. Without belabouring the point, clearly the plaintiff was kept in the dark about this sale and only learnt of it from the newspaper advertisements.”***

Given that state of the record, we find no substance in the complaint that the learned Judge dealt with an unpleaded issue in the matter of the notice or that he decided the same *in vacuo*. The matter was properly before him, fully engaged and the learned Judge was obligated to deal with it. And this is how he dealt with it;

***“34. Moving forward, the 3rd defendant’s witness, Mr. Joseph Matheka (DW3) testified that before the sale, the plaintiff was issued with notice dated 13th June 1984. It was his testimony that a notice had been posted to the plaintiff’s address. However, he did not produce a certificate of posting or any documentary evidence to show that the statutory notice was indeed served on the plaintiff. See Ochieng and Another vs Ochieng and Others, Civil Appeal No.***

***148. of 1995 EALR [1995-98] at pg 260. In the circumstances it is plain that the plaintiff was not served in terms of section 153 of the Registered land Act (Cap. 300).***

***35. It is trite law that non-service of a statutory notice is a fundamental breach of the provisions of section 74 of the RLA which derogates from the chargor’s equity of redemption. In essence without service of valid statutory notice, the power of sale does not crystallize and any act done by the bank to dispose the suit (sic) property amounts to an illegality.***

**36. Having made the above observations, it is clear that the law supports the proposition that where a statutory notice was not served the sale is null and void. Service of a statutory notice is a statutory requirement and a chargee's power of sale is not exercisable without proof of such service. It therefore means that the sale by auction conducted on 30th June 1994 was void and this Court has no powers to give it any legal life."**

With respect, we are of opinion that the learned Judge's approach to the issue was the correct one. He cannot be faulted for finding, as he did, that Urban Credit failed to prove that it had served a statutory notice under **Section 74** of the repealed RLA as it was mandatorily required to. No such evidence was placed before the trial Court and that finding was inevitable.

As to the consequence of failure to issue the statutory notice, we think the learned Judge properly followed this Court's decision of **OCHIENG & ANOR vs. OCHIENG & OTHERS** (supra) which was binding on him. In that case, the appellants filed suit challenging the sale by public auction of some charged properties in purported exercise of a chargee's power of sale. They challenged the sale on ground, *inter alia*, that they had not been served with statutory notices. Even though the Bank's witness produced file copies of letters sent as notice to the appellants' last known address, he did not produce any certificate of posting. Reversing the High Court's finding that the sale was proper, this Court held that;

***"It is for the Chargee to make sure there was compliance with the requirements of Section 74(1) of the Registered Land Act and the burden was not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the charge to prove, that the notice was in fact sent. The bank had failed to produce stamps showing proof of posting of the registered letter(s) containing statutory notice. In the absence of proof of such posting, the sale by auction was void. A sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land sold ..."***

The case at bar is on all fours with that decision and the conclusions the learned Judge arrived at were therefore correct in law. **Section 74(1)** of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title. The learned Judge was right to find and hold that innocence of Gitahi's purchase was not curative of the fundamental defect in the title due to the absence of the requisite notice.

Regrettable as it may be, a void instrument of title such as Gitahi held could not by passage of time be cured of that infirmity. It remains void and of no legal effect. Gitahi's remedy lies against those who sold him the property when the right to sell had not crystallized in law.

In the final analysis, and not without sympathy for Gitahi, this appeal is for rejection. We accordingly dismiss it but with no order as to costs.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of June, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**