



**Kenya Commercial Bank v M'Mionki (Environment and Land Appeal  
1 of 2024) [2024] KEELC 5782 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5782 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 1 OF 2024**

**CK NZILI, J  
JULY 24, 2024**

**BETWEEN**

**KENYA COMMERCIAL BANK ..... APPELLANT**

**AND**

**PHILIP M'MIONKI ..... RESPONDENT**

*((Being an appeal against the judgment of Meru CM's court by Hon.  
John M. Njoroge delivered on 19.4.2023 in ELC No. E010 of 2020))*

**JUDGMENT**

1. The appellant was sued by the respondent at the lower court for failing to transfer L.R No. Nyaki/Kithoka/801 suit lands bought through an auction following the respondent's exercise of a statutory power of sale against Stephen Ndungu Manyeki, who had charged the suit land with the appellant and defaulted to clear the loan. The respondent prayed for an order for the transfer of the land. A list of witness statements and documents accompanied the plaint.
2. By a statement of defence dated 2.11.2020, the appellant denied the claim. Instead, the appellant averred that the respondent failed to comply with the terms and conditions of the auction over the suit land. The appellant termed the suit as fatally defective, disclosed no cause of action; there was no notice given to sue and was otherwise an abuse of the court process. No list of witness statements or documents accompanied the statement of defence.
3. At the trial, Joseph Kilemi Thurairara testified as PW 1. A s holder of a power of attorney produced as P. Exh No. (1) he said his cousin, the respondent, bought the suit land at a public auction in 1980 but the bank refused to transfer the land or hand over vacant possession for there was a third party living on it. He said that the auction was conducted outside the premises of the appellant, Meru Town, following an advertisement in the local dailies.



4. PW 1 said the loan defaulter was one Ndung'u who, after the default, his land was sold to recover the loan. PW 1 had no receipt payments for Kshs.10,000/=, he claimed to have paid at the auction.
5. The appellant called no evidence in support of his case. He faults the trial court through a memorandum of appeal dated 15.5.2023 for:
  - a. Holding that the respondent was a lawful owner of the suit land.
  - b. Finding the suit proved yet there was no evidence recorded to prove the purchase of the land from it.
  - c. Failing to consider the appellant's defence, evidence and submissions.
  - d. Allowing the suit which was a drastic and disproportionate action.
6. This appeal was directed to be canvassed by way of written submissions, whose deadline to file was on 13.7.2024.
7. As appellate court of first instance is mandated to rehearse and re-assess the lower court record and arrive at independent findings as to fact and law, while bearing in mind that the trial court had the benefit of observing the witnesses and hearing their evidence first-hand. See *Gitobu Imanyara & others vs AG* (2016) eKLR.
8. The issue calling for my determination is whether the respondent proved that he bought the suit land from the appellant at an auction and if the appellant proved justification for not honouring the terms and conditions of the auction sale.
9. The respondent had pleaded and testified that he bought the suit land at a public auction held by the appellant following the advertisement of the suit property on account of default by a loanee. Accompanying the plaint was a list of documents, including an official search certificate, showing a charge was registered to secure a loan against the title on 22.1.1976 and that the land, as of 29.7.2020, was still in the names of the appellant and the defaulter Stephen Ndung'u. There was also a demand letter dated 25.8.2020, indicating that even though the respondent was in possession of the land, the bank had not executed a transfer, the title deed was still encumbered.
10. The letter had also requested the appellant to sign a fresh transfer and a discharge of charge.
11. The initial transfer was also attached, showing that the same had been prepared dated 13.9.1980 and duly signed by the respondent. All these documents accompanying the plaint were duly served upon and came to the knowledge of the appellant when it filed the statement of defence. In paragraph 5 of the statement of defence, the appellant blamed the respondent for breaching the terms and conditions of the auction. The particulars were not pleaded.
12. Orders 2, 3, 4 and 7 of the *Civil Procedure Rules* provide for matters or facts that must be specifically pleaded. See *Diamond Trust Bank (K) Ltd vs Said Hamad Shamisi and 2 others* (2015) eKLR. Similarly, Orders 2 & 7 of the *Civil Procedure Rules* provide for a list of witnesses, witness statements and documents that must accompany the pleadings and, if not so must be filed during the pre-trial conference as per Order 11 of the *Civil Procedure Rules*.
13. A party may also apply to file and serve those witness statements and documents before the hearing date. In this appeal, the appellant failed to file before the trial court any witness statements and documents in support of its statement of defence. Similarly, the appellant opted to call no evidence in support of its statement of defence. The absence of calling evidence in support of the statement



of defence meant that the contents thereof remained mere statements with no evidentiary burden to sustain them.

14. Courts do not re-write agreements for parties other than enforcing the rights of the parties to it, except if the contract is illegal, unconscionable, invalid and or unlawful. The terms alleged to have been breached by the respondent were also not specifically pleaded and proved. How and when the breach occurred was not pleaded facts of notification to rectify the breach upon the respondent was pleaded. Payment of the sum at the fall of the hammer by the respondent was not disputed in the pleadings and at the hearing of the suit.
15. Facts to show that there was a fundamental breach of the terms and conditions of the public auction and sale conduct were not pleaded, and evidence to sustain them by the appellant.
16. It is the appellant who waived its rights to file witness statements and documents or call evidence to sustain its case. It is, therefore, estopped in law from blaming the trial court for ordering the defence case closed, after a request by the appellant's counsel. The doctrine of estoppel and waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known their existence as held in *Serah Njeri Mwobi vs John Kimani Njoroge* (2013) eKLR and *Seascapes Ltd vs Development Finance Co. D (K)* NRB Civil Appeal No. 247 of 2001.
17. Title to land in this matter passed to the respondent the moment the hammer fell, and the loan defaulter failed to redeem the suit land. See *Patrick Kanyagia and another vs Damaris Wangechi & others* (1995) eKLR and *Rose Waswa Masinde vs Nekesa Simiyu Mukopi* (2014) eKLR.
18. The appellant failed to plead and tender evidence on any justification why the transfer has not been effected since 1980. The evidence provided by the respondent to show that he paid Kshs.10,000/= at the auction and signed the transfer forms was not controverted. Parole evidence cannot be used to vary a contract in the terms of the auction sale. See *HFCK vs Wambugu* (1999) 2 E.A 779.
19. The appellant cannot be heard to challenge the judgment as drastic or disproportionate when it brought no evidence or failed to plead anything to show a breach on the part of the respondent.
20. Written submissions are marketing tools which cannot replace pleadings or evidence as held in *Daniel Toroitich Arap Moi vs Stephen Muriithi* (2014) eKLR. The appeal is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**

**ON THIS 24<sup>TH</sup> DAY OF JULY, 2024**

**IN PRESENCE OF**

C.A Kananu/Mukami

Miss Swaka for the appellant

**HON. C K NZILI**

**JUDGE**

