



**Kirimi v Karanja (Environment & Land Case 315 of 2017)
[2024] KEELC 5425 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 315 OF 2017
LC KOMINGOI, J
JULY 18, 2024**

BETWEEN

IRENE WAMUCII KIRIMI PLAINTIFF

AND

MARGARET MUMBI KARANJA DEFENDANT

JUDGMENT

1. By the Plaintiff dated 4th May 2010 filed at the High Court in Nairobi and later transferred to this court, the Plaintiff claims that she acquired property Title No. Kajiado/Ololoitikoshi Kitengela/1678 from National Bank of Kenya Ltd on 10th November 2009 through a public auction for a consideration of Kshs. 7,050,000. The bank issued her a Memorandum of Sale on the same date upon payment of Kshs. 2,000,000 as deposit towards the purchase. On 13th November 2009 she paid the remaining balance. Consequently, she conducted a search which showed that she was the absolute proprietor of the property. However, the Defendant having been the previous owner, had refused to vacate the property and had even buried the remains of her late husband on the property. The plaintiff thus sought for;
 - i. Delivery of vacant possession of the suit premises namely Title No. Kajiado/Ololoitikoshi Kitengela/1678.
 - ii. An order that the Defendant exhume and remove the remains of Joseph Njogu Karanja from the suit premises namely Title No. Kajiado/Ololoitikoshi Kitengela/1678.
 - iii. Mandatory injunction to evict the Defendant, her workers, agents, servants and/or others under her from the suit premises namely Title No. Kajiado/Ololoitikoshi Kitengela/1678.
 - iv. General damages for trespass and interest thereon from 4th December 2009 until payment in full.



- v. Costs of this suit and interest thereon.
2. In her Statement of Defence, the Defendant denied the allegations that the Plaintiff was the registered owner of Title No. Kajiado/Ololoitokoshi Kitengela/1678 and stated that there was a pending suit at the High Court Commercial Division No. 853 of 2009 involving the same subject which was yet to be determined. Therefore, this current suit was an abuse of the court process.

Evidence of the Plaintiff

3. PW1 Irene Wamucii Kirimi testified on 26th July 2003. She adopted her witness statement dated 22nd March 2012 and produced as exhibits seven documents which were marked as P. Exhibit 1- 7.
4. On cross examination she stated that she purchased the suit property in a public auction and the title to the property duly registered in her name. She confirmed that her husband was not party to this suit and she was not aware of the orders in the suit against her husband.

Evidence of the Defendant

5. DW1 Margaret Mumbi Karanja the Defendant also adopted her witness statement dated 10th January 2013 and produced her bundle of documents as evidence which was marked D. Exhibit 1-9. She urged that the suit be dismissed.
6. On Cross-examination she confirmed that the property had been charged to National Bank of Kenya Ltd in 1994 for a loan facility but she had not consented to the second charge over the property. She confirmed that the property was sold through a public auction but the process was irregular and the property had been undervalued although she did not have a valuation report in court.
7. On re-examination she stated that there was a pending suit at the High Court in Nairobi challenging the auction and one of the Defendants was the Plaintiff's husband. She also stated that upon sale of the property, auctioneers raided the house, demolished things and her husband was murdered in the process. She stated that the Criminal case was pending.
8. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

9. Counsel for the Plaintiff submitted that at the time the property was charged, spousal consent was not a requirement as was held in *Gladys Wanjiku Waititu v Housing Finance Company Ltd & another* [2017] eKLR and *Barclays Bank of Kenya v Attorney General*.
10. On the issue that the property was undervalued at the time of sale, counsel submitted that the Plaintiff is not party to this issue since she attended the auction and was the highest bidder. Therefore, should the Defendant be aggrieved with the sale, her recourse was in the remedy of damages as was held in *John Kagura Gitbae v KCB Ltd & 2 others* and *Bomet Beer Distributors Ltd v Kenya Commercial Bank Ltd* [2005] eKLR.
11. As such, the Plaintiff was entitled to the orders sought with costs, because she had proved her case on the required threshold.

The Defendant's Submissions

12. Counsel for the Defendant submitted that the suit was *sub judice* and should be dismissed with costs to the Defendant because both cases related to the same subject matter contrary to Section 6 of the *Civil Procedure Act* and as held in *Kenya National Commission on Human Rights v Attorney*



General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020]; Kenya Bankers Association v Kenya Revenue Authority [2019] eKLR; Republic v Pual Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya [2020] eKLR; and Henry Sumba Okutoyi v Amina Ambetsa [2021] eKLR.

Analysis and Determination

13. I have considered the pleadings, the evidence on record, the written submissions and the relevant authorities. I find that the issues for determination are:
 - i. Whether this suit is *sub judice*.
 - ii. Whether the Plaintiff is entitled to the prayers sought.
 - iii. Who should bear costs of this suit?
14. This court will begin by determining the question of whether this suit is *sub judice* because it touches on the jurisdiction of this court.
15. Section 6 of the Civil Procedure Act provides that:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
16. The Plaintiff's case is that she purchased the suit property vide a public auction conducted on 10th November 2009 and seeks eviction orders against the Defendant from that property. The Defendant however contests the said public auction stating it was irregularly undertaken and there was a pending suit at the High Court contesting the sale. The Defendant submitted at length on this issue as summarised above, although the Plaintiff made no reference to this.
17. When cross examined the Plaintiff told the court that she was not a party to the suit in the Milimani High Court.
18. I have looked at the Prayers sought in Milimani High Court Civil Case No. 853 of 2009; Margaret Mumbi Karanja vs. NBK Ltd & 2 Others. I find that the same are not directed to the Plaintiff herein as she is not a party in that suit.
19. I am not convinced that this suit is *sub judice*. In any case why did it take so long for the defendant to raise this issue?
20. The Defendant does not deny that she guaranteed the said loan and consented for the charge to be drawn against the suit property.
21. The Plaintiff bought the suit property in an Auction. The Court of Appeal in the case of Sema Health Products Ltd vs. Housing Finance Corporation & Another (2024) KECA 245 KLR held;
 - “ 22. Even if the applicant's intended appeal were to succeed, the law is clear that a mortgagor's equity of redemption is extinguished at the fall of the hammer and the only remedy lies in an action for damages. See Section 99 (4) of the Land Act 2012. The 1st Respondent has averred that it is a reputable commercial



lender which the applicant has not disputed. It would be in a position to compensate the applicant if its appeal is successful.”

22. Similarly in *Cieni Plains Company Limited & 2 Others v Eco Bank Kenya Limited* [2017] eKLR . The Late Onguto J held;

“ 68..... I must point out that there is now a clear paradigm shift when it comes to purchasers of charged property. The statute affords them protection. Section 99 of the *Land Act* shields the purchaser almost absolutely save where he has participated in fraud. Instead the purchaser is not to be robbed of any acquisition simply because the sale was irregular and or improper or out of dishonest conduct.....Indeed Section 99 proceeds to state that the party prejudiced by the sale is to be compensated through damages.”

23. I am guided by the above authorities in finding that the Plaintiff ought to be left to enjoy the suit property which she purchased in a public auction over fourteen (14) years ago.

In any case one of the prayers in the Milimani case is that of general damages.

24. The issue as to whether the property was undervalued at the time of sale will be dealt with in the other suit.

25. I find that the Plaintiff is entitled to the reliefs sought except the damages for trespass because the court was not guided on the quantum.

26. In conclusion, I find that the Plaintiff has proved her case as against the Defendant on a balance of probabilities.

27. Accordingly I enter Judgement in favour of the Plaintiff as follows.

- a. That an order is hereby issued for delivery of vacant possession of the suit property being Kajiado Olooloitikoshi Kitengela/1678 to the Plaintiff within sixty (60) days from the date of this Judgement. In default the Plaintiff do use lawful means to evict the Defendant at the Defendant’s expense.
- b. That an order is hereby issued directed to the Defendant to exhume and remove the remains of Joseph Njogu Karanja from the suit property namely Kajiado Olooloitikoshi Kitengela/1678 within sixty (60) days from the date of this Judgement. Failure to which the Plaintiff do undertake the exhumation at the Defendant’s expense.
- c. The Plaintiff shall have costs of the suit and interest.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Muturi for the Plaintiff.

Ms. Gathua for the Defendant.

Court Assistant – Mutisya.

