



Kabiru v Faulu Micro-Finance Bank Limited & 2 others (Environment & Land Case 178 of 2016) [2024] KEELC 7091 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 178 OF 2016
JM MUTUNGI, J
OCTOBER 31, 2024**

BETWEEN

JOYCE NANCY KABIRU PLAINTIFF

AND

FAULU MICRO-FINANCE BANK LIMITED 1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT

CREATIVE LINKS ENTERPRISES 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted the instant suit by way of a Plaint dated 2nd November, 2016 which was subsequently amended on 28th September, 2017. By the Amended Plaint, the Plaintiff prayed for the following orders:-
 - a. A declaration that the sale by public auction of title number Mwerua/Mukure/1673 to the 3rd Defendant is void.
 - aa. Cancellation of the 3rd Defendant as the proprietor of title Number Mwerua/Mukure/1673 and subsequent registration of the Plaintiff as the proprietor of the same.
 - b. A permanent injunction do issue against the Defendants restraining by themselves, their agents, and/or servants from transferring, evicting, removing, alienating and/or otherwise interfering with the Plaintiff's right, her agents and/or servants in anyway on land parcel number Mwerua/Mukure/1673.
 - c. That the Plaintiff be allowed to sell land parcel number Mwerua/Mukure/1673 privately in order to pay the loan balance together with interest.



- cc. Alternatively and without prejudice to the above prayers, the Plaintiff be paid special damages and general damages.
 - d. Costs of this suit with interest at court rate.
 - e. Any other relief that this Honourable court may deem fit to grant.
2. Briefly the Plaintiff's case was that she had been advanced a loan of Kshs 1,100,000/- by the 1st Defendant against the security of a charge registered over Mwerua/Mukure/1673. She experienced difficulties in servicing the loan leading to the 1st Defendant initiating action to realise the security to recover its money. The 1st Defendant issued demand for the payment of the loan and when the Plaintiff failed to redeem the loan, the 1st Defendant instructed the 2nd Defendant to sell the security in exercise of the chargee's power of sale. The 2nd Defendant acting on the instructions of the 1st Defendant, conducted a public auction on 7th October, 2016 at Kerugoya at which the 3rd Defendant purchased the charged property at Kshs 3,000,000/- after being declared to be the highest bidder.
 3. The Plaintiff contended the public auction sale was not properly conducted alleging there was no notification of sale served on the Plaintiff, breach of duty on the part of the 1st Defendant in not obtaining the best reasonable price at the time of sale and consequently having the property sold at an under value.
 4. The Plaintiff contended there was collusion between the Defendants to have the property sold below the market value. It was the Plaintiff's contention that the market valuation of the charged property was Kshs 7,500,000/- yet it was sold for Kshs 3,000,000/-.
 5. The 1st Defendant filed a statement of defence dated 22nd November, 2017 where it denied all the allegations against it contained in the Plaint. The 1st Defendant asserted and contended that all due process was complied with in regard to the realization of the security held. The 1st Defendant reiterated that the sale of the charged property was sold in accordance with the law.
 6. The 3rd Defendant filed its statement of defence dated 8th August, 2019 on 16th August, 2019. The 3rd Defendant in the defence denied the allegations of fraud attributed to it by the Plaintiff and averred that it validly purchased the suit property at the Public Auction on 7th October, 2016 and that it duly paid the purchase price of Kshs 3,000,000/- in full and had the property transferred to its name after adhering to all the due process upon which it assumed possession and use of the property. The 3rd Defendant denied this Court had jurisdiction to hear and determine the case arguing that the claim arose out of a Commercial transaction and that this Court lacked jurisdiction to deal with the matter as the dispute did not fall under Section 7 of the *Environment and Land Court Act*, 2011.

Evidence of the Parties.

7. The Plaintiff testified as the sole witness in support of the Plaintiff's case while representatives of the 1st and 3rd Defendants testified in support of their respective defences. The 2nd Defendant did not appear and/or participate in the proceedings. For all intent and purposes the 2nd Defendant acted as the agent of the 1st Defendant.
8. The Plaintiff in her evidence adopted and relied on her witness statement dated 16th May, 2022 and further relied on her bundle of documents which were admitted as "PEX 1-12" as itemized on the list of documents filed and dated 16th May, 2022. The Plaintiff admitted that in 2014 she obtained a loan from the 1st Defendant and as security for the loan she charged her land parcel Number Mwerua/Mukure/1673 to secure the loan of Kshs 1,100,000/- together with interest. The Plaintiff admitted



- that she experienced financial difficulties and was not able to repay the loan facility as had been agreed with the 1st Defendant which prompted the 1st Defendant to call up the loan and initiate action to realise the security held.
9. The Plaintiff affirmed that she received a letter of demand from the 1st Defendant dated 30th December, 2014 demanding Kshs 1,624,353.48 being the principal sum together with interest and other charges but since she had financial challenges she approached the 1st Defendant and entered into a mutual arrangement where she would continue making payment in terms of the loan agreement. The Plaintiff stated that by 25th July, 2016 she had reduced the loan balance to Kshs 1,065,091.70 but the 2nd Defendant vide a letter dated 1st August, 2016 notified her that her property title Number Mwerua/Mukure/1673 would be sold by public auction on 7th October 2016 to recover the money owing to the 1st Defendant. As per her witness statement, the Plaintiff's efforts to negotiate with the 1st Defendant to have the sale notification of the security withdrawn were not successful as the 2nd Defendant proceeded to hold the auction sale on 7th October, 2016 where the 3rd Defendant was declared the buyer on a bid of Kshs 3,000,000/-.
 10. The Plaintiff contended that the 2nd Defendant sold the property at an undervaluation as the then Current Market Value for the property was Kshs 7,500,000/-.
 11. The Plaintiff cross examined by Ms. Sakwa Advocate for the 1st Defendant, affirmed that she received the notification of sale and that as at the time the security was sold she was in arrears in the repayment of the loan. Further cross examined by Mr. Magee Advocate for the 3rd Defendant the Plaintiff explained that she wrote to the 1st Defendant urging them to agree to have the auction sale stopped but the Bank did not agree and the sale was conducted on 7th October, 2016. The Plaintiff conceded that the application she made to Court to stop the transfer of the property to the 3rd Defendant was dismissed.
 12. Maurine Kahiho (DWI) a Legal Officer of the 1st Defendant testified on behalf of the 1st Defendant. The witness adopted her filed witness statement dated 14th November, 2022 as her evidence and placed reliance on the filed bundle of documents as per the list dated 19th August, 2019 comprising nine (9) documents which were admitted in evidence ("DWI EX 1-9"). The witness testified that the Plaintiff was issued a demand notice and statutory notice was served which called up the entire outstanding loan balance since there was default on the part of the Plaintiff in servicing the loan. The witness explained that as the Plaintiff did not regularize the account, the 1st Defendant gave instructions to the Auctioneers (2nd Defendant) to realise the security held to recover the debt. The Auctioneers issued the requisite notices and the security was sold by public auction on 7th October, 2016.
 13. The witness testified that the security had been valued at Kshs 4.0 Million and the Forced Sale Value was Kshs 3.0 Million. She stated that as per the report from Auctioneers the 3rd Defendant had made the highest bid of Kshs 3.0 Million which was accepted. The witness confirmed the 25% of the purchase price was paid to the Bank and the balance was paid within the stipulated 90 days of the date of sale.
 14. On cross-examination by Ms. Makworo Advocate for the Plaintiff, DWI affirmed that the requisite notice under Section 96 of the *Land Act* was issued to the Plaintiff. The witness stated the property had been valued in October 2015 and the Market Valuation was Kshs 4.0 Million with a forced value of Kshs 3.0 Million. The witness agreed the Plaintiff had paid some Kshs 50,000/- before the auction was held. She denied the property was sold at an under valuation and further stated the balance of the purchase price after offsetting the outstanding balance was paid to the Plaintiff's Bank Account. The witness maintained the bank had no basis to stop the auction sale as there was default on the repayment of the loan.



15. Leah Nyambura Mwangi (DW2) testified on behalf of the 3rd Defendant. She testified that she was a Director of the Company and that she had recorded a witness statement dated 3rd March, 2023 and that she had authority of the Company to represent it. She adopted her witness statement as her evidence and relied on the exhibited bundle of documents as per list dated 8th August, 2019. The documents were admitted in evidence as “D3-EX 1-18”.
16. In cross examination by Ms. Makworo for Plaintiff DW2 stated she was a Director of the 3rd Defendant at the time the property was purchased. She stated the Company made a resolution to bid to buy the property at the public auction after they saw the advertisement in the Newspaper. She stated the Company bid and purchased the property at Kshs 3.0 Million. She affirmed that before purchasing the property at the Auction they visited the property and noted there was tea planted and some bananas. She denied there was any collusion between the Bank and her husband to buy the property at an under valuation. The witness explained there were other bidders at the Auction but that her bid of Kshs 3.0 Million was the highest. She stated she purchased the property regularly and that she was now in possession of the land and was utilizing the land. She affirmed the Bank transferred the property to the 3rd Defendant after the purchase price was paid.
17. The parties filed their final closing written submissions as per the directions of the Court. The Plaintiff filed her submissions date 5th April, 2024. The 1st and 3rd Defendants filed their submissions dated 30th June, 2024 and 10th June, 2024 respectively. I have reviewed the pleadings, the evidence and I have considered the submissions made by the parties and the following are the issues that arise for determination:-
 - i. Whether the Court had jurisdiction to hear and determine the matter?
 - ii. Whether the Public Auction sale of title Number Mwerua/Mukure/1673 was lawfully conducted, and if so, whether the property was sold at an undervaluation?
 - iii. Whether the Plaintiff is entitled to any special or general damages?
 - iv. What relief should the Court grant?

Whether the Court had Jurisdiction.

18. The 3rd Defendant in its defence and submissions had contended that the Court lacked the jurisdiction to deal with this matter as it was a Commercial transaction between the Plaintiff and the 1st Defendant where the 1st Defendant advanced to the Plaintiff a loan and in respect of which a charge over the suit property then belonging to the Plaintiff was taken to secure the loan. The 3rd Defendant in their submissions relied on Section 80 of the Land Act, 2012 to urge that a charge over land operates as a security only and does not confer the interests and/or rights conferred by a transfer of land. The 3rd Defendant thus argued a chargee/lender has rights and/or remedies conferred by the charge that entitles them to realise the security. The 3rd Defendant contended that the right to realise the security was a product of the Commercial transaction between the parties and any dispute that arose ought to be brought before the High Court which had jurisdiction and not the ELC Court. The 3rd Defendant further placed reliance on the Case of Bank of Africa Kenya Ltd & Another –vs- TSS Investment Ltd & 2 Others (2024) KECA 410 (KLR) where the Court of Appeal overturned a decision of the ELC Court, where it had held it had jurisdiction in a matter arising out of a security realization exercise.
19. I have taken note that the issue of this Court’s jurisdiction was raised by way of Preliminary Objection before my predecessor, Cheronon, J by the 3rd Defendant. In a considered ruling the Judge delivered a



Ruling on 11th March, 2022 and dismissed the Preliminary Objection on the basis that it lacked merit. Under Paragraph 23 and 24 of the Ruling the Judge stated:-

23. I have looked at the Plaintiff's amended Plaintiff which was filed on 28th September, 2017. Though the suit is premised on a charge instrument dated 13th February 2014 over property number Mwerua/Mukure/1643 securing a loan of Kshs. 1,100,000/- together with interests thereon, the plaintiff's claim is for a declaration that the sale of the sale land by public auction be declared fraudulent, unlawful, null and void among other prayers.
24. From those prayers being sought, I find and hold that this Court has jurisdiction to hear and determine the Plaintiff's suit. I take the same view as was held in the case of Lydia Nyambura Mbugua (supra) where the Court pronounced itself as follows;

“ The High Court cannot therefore have jurisdiction, given the provisions of Article 165(5) of *the Constitution*, to hear a matter relating to the process of sale of a charged property, unless that issue arises in a case relating to issues that the High Court would have jurisdiction, and the same cannot be severed from these other issues. It needs to be appreciated that the High Court cannot have jurisdiction over matters that fall within the jurisdiction of the ELC”
20. The 3rd Defendant did not appeal against the said Ruling and hence this Court having pronounced itself on the issue of the jurisdiction of the Court cannot sit on appeal on its own decision. I therefore hold the Court has jurisdiction to hear and determine the matter.

Whether the Public Auction was Lawful.

21. The Plaintiff in the Plaintiff, the evidence and submissions has questioned the validity of the Public Auction sale. The Plaintiff however acknowledges she was issued a Demand Notice and Notice of Intention to sell the charged land by Public Auction. The Plaintiff stated her Advocate wrote to the 1st Defendant requesting for the withdrawal of the Notice of Sale so that they could renegotiate fresh terms for the repayment of the outstanding loan and as a sign of good faith she paid a deposit of Kshs 50,000/- to the Bank but the 1st Defendant nonetheless authorized the 2nd Defendant to proceed with the Public Auction sale on 7th October, 2016 as scheduled whereupon the property was sold at Kshs 3.0 Million which the Plaintiff claimed was below the market value.
22. As per the evidence adduced there is no dispute that the Plaintiff was advanced a loan by the 1st Defendant and as security for the repayment of the loan the Plaintiff charged her parcel of land Mwerua/Mukure/1673. the Plaintiff defaulted on the repayment of the loan and the 1st Defendant made a formal demand to the Plaintiff vide a demand letter dated 21st August, 2014 for payment of the amount in arrears and regularization of the account and notified the Plaintiff if the default persisted the 1st Defendant would proceed with the realization of the security on expiry of three (3) months from the date of the Demand Letter. This demand Notice was issued pursuant to the provisions of Section 90 of the *Land Act*, 2012. Apparently the Plaintiff did not regularize her account with the 1st Defendant and the 1st Defendant vide its letter dated 30th December, 2014 demanded the total outstanding loan balance of Kshs 1,624,553.48 being the principal sum together with interest and other charges and gave notice to sell the property after the expiry of 40 days if the total loan balance inclusive of interest and other charges would not have been paid. This notice was issued pursuant to the provisions of Section 96 of the *Land Act*, 2012. the 2nd Defendant on 2nd August, 2016 served the Plaintiff with the requisite Notification of sale by public Auction scheduled to take place on 7th October, 2016 unless the outstanding balance of Kshs 1,065,091/70 as at 25th July, 2016 together with the Auctioneers charges was paid.



23. On evaluation of the evidence as relates to service of the requisite Statutory Notices before the 1st Defendant's exercise of the chargee's power of sale conferred under the charge, I am satisfied that the Plaintiff was served with all the appropriate notices. Once there was default on the repayment of the loan, the 1st Defendant was entitled to recover the debt through realization of the security held provided due process was followed. See the Case of Mary Atieno Nyamogo –vs- Barclays Bank of Kenya Ltd (2011)eKLR and the Case of Mafuta Products Ltd & another –vs- Barclays Bank & Another (2017) eKLR. In the latter case the Court stated that:-

“Naturally, upon default the chargee's power of sale arises. However, in the exercise thereof the charge must follow the laid down procedures, and/or substantive law.”

24. In the instant case once default occurred, and the Plaintiff does not deny she defaulted, the chargee was in law entitled to take any necessary steps to realise its security. If the Public Auction sale takes place, and a third party buys the property, the chargor's right of redemption is lost and thus even if there was irregularity in the conduct of the Auction, the chargor's remedy lies in damages and not in the rescission of the sale that was concluded with the fall of the hammer. I share the sentiments expressed by Joel Ngugi, J (as he then was) in the Case of Joyce Wairimu Karanja –vs- James Mburu Ngure & 3 Others (2018) eKLR where he stated at Paragraph 33 thus:-

33. --- Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an Auction conducted in the exercise of the Statutory Power of sale is immunized from suit under Section 99 of the Land Act. Thirdly, a mortgagor's equity of redemption is extinguished upon the fall of the hammer in public Auction. Fourthly, there is no requirement in Law or equity that a mortgagor re issues the statutory notice if a planner auction is temporarily stopped by the Court and then permitted to proceed through the lifting of the temporary orders.”

24. While I endorse the above exposition of the law by the Learned Honourable Judge, I would further add that even where a chargee/mortgagee initiates the process of exercising its statutory power of sale and the process is halted because the mortgagor/chargor seeks accommodation and is accommodated on terms by the chargee, which terms the chargor defaults in honouring, the chargee can re-initiate the process of exercising its power of sale without necessity to re-issue the statutory notice under Section 90 of the Land Act.

Whether the property was sold at an under valuation.

26. . Having determined that the Public Auction Sale was regularly scheduled. I take note that the Plaintiff has contended there was collusion between the Defendants to have the property sold at an under valuation of Kshs 3.0 Million, and now it behoves the Court to consider the validity or otherwise of the Plaintiff's assertions. The Plaintiff's assertion that the suit property was sold at an undervalue was no doubt predicated on the valuation of the land that she obtained dated 27th October, 2016 which placed the market value at Kshs 7,500.000/-. No valuation report was produced by the parties to indicate what the valuation of the land as at the time the charge was taken on 14th February, 2014. However, the 1st Defendant vide a letter dated 10th October, 2015 instructed the Firm of Njihia Muoka Rashid Co. Ltd, Valuers to inspect the property and to advise on its Current Market Value and Forced Sale Value for Auction purpose. The Firm prepared a report dated 23rd October, 2015 where they advised the Current Market Value was Kshs 4.0 Million while the Forced Sale Value was Kshs 3.0 Million.

27. The Plaintiff argues the fact that the 3rd Defendant made a resolution to bid for the property for Kshs 3.0 Million and the property was sold for Kshs 3.0 Million was suggestive of collusion between



the Defendants to sell the property at an undervaluation. It is noteworthy that the valuation report prepared at the instance of the Plaintiff was prepared after the public Auction had been conducted. Though the Plaintiff alleged fraud and/or collusion on the part of the Defendants in the conduct of the Public Auction sale, she offered no evidence in support of the allegation. The Auctioneer who carried out the auction gave a report on the conduct of the Auction at which she stated at the auction she received 3 bids of Kshs 2.5 Million, Kshs 2.8 Million and Kshs 3.0 Million from the 3rd Defendant's representative which was the highest and which she accepted as it met the threshold of the Forced Sale Value of Kshs 3.0 Million.

27. The Plaintiff in her submissions placed reliance on the Case of Basil Critocos –vs- National Bank of Kenya Ltd & Another (2022) KECA 541 (KLR) where the Court of Appeal set aside a sale purportedly carried out in exercise of the chargee's power of sale on inter alia the ground that the sale price was at a gross under value. With respect, the facts in that case are distinguishable from the facts in our instant case. In the Basil Criticos Case (supra) the Chargee purported to exercise its power of sale when there was in force an injunctive order and hence was in contempt of Court. Further in the Case the Chargor (criticos) adduced evidence of his Valuer (Mr. Mwaka Musau) who prepared a valuation report in 2010 that indicated the value of the disputed land was Kshs 3,028,890,000/-. The Respondent (National Bank Ltd) relied on a Valuation report allegedly prepared by a Government Valuer in 2007 which indicated the Valuer of the land to be Kshs 55,000,000/- at which the property was sold. The Court of Appeal analysed the evidence and held the evidence of the Appellant was not rebutted relating to the valuation as the Respondent (National Bank Ltd) never produced a valuation report for 2010 to contradict the evidence of the Appellant's witness. On that account the Court held the property was sold at a gross under Value. The Value of Kshs 55 Million in 2007 and Kshs 3.02 Billion in 2010 simply had no correlation and the Bank no doubt needed to rebut the 2010 Valuation Report.
27. In the instant case the 1st Defendant/Chargee gave notice to the Plaintiff of its intention to realise the security held vide its letter of 30th December 2014 if default continued. Before the Chargee could exercise its Power of Sale it was required under Section 97 (2) of the Land Act to undertake a valuation of the charged land through a Valuer. Section 97(2) provides as follows:-

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- (2) A Chargee shall, before exercising the right of sale, ensure that a Forced Sale Valuation is undertaken by a Valuer.

27. The 1st Defendant in compliance with Section 97(2) of the Land Act obtained the valuation report dated 23rd October, 2015 that placed the Market Value of the suit property at Kshs 4.0 Million and the Forced Sale Value at Kshs 3.0 Million. The Auction sale was not staged immediately the Valuation Report was prepared as the decision to exercise the Power of Sale was taken in August 2016 when the 1st Defendant instructed the 2nd Defendant to carry out the auction sale. As at that time, the period that had elapsed since the valuation had been done was about nine (9) months. In my view once a Chargee undertakes a Valuation for purposes of Section 97(2) of the Land Act, such a report ought to be deemed valid for a period of up to twelve (12) months or one year. In making such observation I take cognizance of the fact that preparation requires to be undertaken to stage an auction and the parties maybe engaged in negotiations that ultimately fail to materialize. Further, I recognize that barring any exceptional circumstances the prices of land do not markedly change within a period of one year and further that the price could either appreciate and/or depreciate depending on the fundamentals at play. In the premises I do not consider that the lapse of nearly One year from the time the Chargee had obtained the Valuation report and when the Public Auction Sale was conducted was such a period as necessitated the Chargee to obtain a fresh Valuation Report. Hence it is my determination that the



Public Auction Sale was validly held and that the sale was not at an undervalue since it conformed to the Valuation carried out in October 2015.

27. In the Case of Zum Zum Investment Limited –vs- Habib Bank Ltd (2014) eKLR the Court stated as follows:-

“In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds.”

27. The Valuation Report obtained by the Plaintiff after the Public Auction Sale and after the Plaintiff had been notified of the outcome of the Public Auction, may have been influenced and designed to achieve a predetermined objective, to show the property was sold at an undervaluation. The Valuer who prepared the report was not called to testify and it would be unsafe to accept the Valuation Report as a reflection of the true Market Value of the suit property at the time it was made. I therefore make a finding that there was no proof that the 1st Defendant was in breach of its statutory duty to the Plaintiff as the Mortgagor/Chargor when it exercised its statutory power of sale under the Charge. The Plaintiff in the circumstances cannot be entitled to any damages as the 1st Defendant acted within the Law in realizing its security.

27. The 3rd Defendant was entitled to participate in the Public Auction Sale as it did. The Plaintiff did not prove there was in collusion between the 3rd Defendant and the 1st Defendant and/or with the Auctioneer, the 2nd Defendant. The Public Auction was held in Public and the 1st Defendant with others offered their bids as per the report by the Auctioneer on the Auction. The Plaintiff of course must have found it difficult to accept her property had gone but every Chargor who offers their property as security must accept that when default occurs on the repayment of the loan secured by the property, the security becomes a commodity for sale liable to be sold by the Chargee in exercise of its Statutory Power of Sale. Where a Chargee has adhered to the provisions of the Law in exercising the Power of Sale, he cannot be restrained. The charge constitutes a contract between the chargor and the chargee and where the chargor defaults on the terms, there are consequences which include the right by the Chargee to exercise its Power of Sale to realise the security.

27. Upon a careful evaluation and consideration of the evidence, I am not satisfied the Plaintiff has proved her case on a balance of probabilities. The suit is without merit and I dismiss the same with costs to the 1st and 3rd Defendants.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 31ST DAY OF OCTOBER 2024.

J. M. MUTUNGI

ELC - JUDGE

