



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 591 OF 2008

JOSEPHINE KAMENE J. MUSOLA ::::::::::::::: PLAINTIFF

-VERSUS-

DEPOSIT PROTECTION FUND BOARD ::::::::::::::: 1st DEFENDANT

TRUST BANK LIMITED (in liquidation)

RAPHAEL KABUGU WARUI ::::::::::::::: 2ND DEFENDANT

J U D G E M E N T

- 1.** The suit herein was instituted by way of a Plaint date **8th October 2008** and filed in Court on **9th October 2008**.
- 2.** The facts of the case are as follows. The Plaintiff was the registered leasehold owner of property known as NAIROBI/BLOCK 75/706 on which stands a residential house and is situated within Buru Buru Estate Nairobi ("Suit property). The Plaintiff states that in the year 1995, the said property was charged to Trust Bank Limited (now in liquidation) to secure some financial advances to one Kevin Malinga in the sum of Kshs. 750,000/-. To the best of her knowledge the loan facility was fully repaid by the borrower and herself prior to 15th August 2001.
- 3.** It is the Plaintiff's case that on the aforesaid date the 1st and 2nd Defendants colluded and fraudulently sold the suit property in an alleged public Auction purportedly in exercise of the Bank's Statutory power of sale. Thereafter the suit premises were transferred to the 2nd Defendant.
- 4.** It is the Plaintiff's case that she was not notified of any default in payment of the loan. She further avers that she was never served with the mandatory statutory notice of the banks intention to realize the security. The Plaintiff only came to know of the sale of the suit property and change of ownership when she was served with Court papers in Nairobi CMCC No. 7347 of 2002 by the 3rd Defendant as the new registered owner of the suit property on or about the 29th April 2003.
- 5.** It is further the Plaintiff's case that the purported sale of the suit property by the Bank and subsequent registration of the 2nd Defendant as proprietor through a transfer by charge on or about 28/12/2001 were fraudulent and unlawful.

6. The Plaintiff avers that as a result of this unlawful commission by the Defendants she has been deprived of ownership of the suit premises and has suffered mental anguish, loss and damages. The Plaintiff therefore prays for judgment against the Defendants for:-

a) A declaration that the sale by public auction of the suit premises known as NAIROBI BLOCK 75/706 on the 15/8/2001 was illegal, unlawful, unprocedual and hence null and void.

b) An order directed to the Commissioner of lands to rectify the register in respect of Nairobi block 75/706 in favour of the Plaintiff.

c) Damages

d) Costs of the suit.

7. The Plaintiff's claim is controverted. On 9th January 2009, the 1st Defendant filed its Statement of Defence while the 2nd Defendant filed its Defence and Counterclaim on 24th December 2008.

8. The 1st Defendant, the liquidator of Trust Bank Limited in liquidation confirms that the suit property was sold on 15th August 2001 by public auction and subsequently transferred and registered in the 2nd Defendant's name. However, it is the 1st Defendant position that the said auction was done in lawful exercise of the chargee's statutory power of sale. The 1st Defendant denies the allegation that the financial facility of Kshs. 750,000/= had been paid prior to the auction.

9. The 1st Defendant further denies that the said sale by way of public auction was characterized by collusion and fraud on its part as alleged by the Plaintiff.

10. On whether or not the Plaintiff was notified of any default in payment of the loan, it is the 1st Defendant's averment that the Plaintiff was at all times aware that the borrower had defaulted in the loan repayment. The 1st Defendant avers that the Plaintiff was served with the requisite statutory notices both under the Registered Land Act (Cap 300 Laws of Kenya) and the Auctioneer's Act, 1996. According to the 1st Defendant the Plaintiff acknowledged service of the Statutory Notice in a suit she filed against the 1st Defendant in Nairobi HCCC No. 2059 of 1999.

11. It is averred by the 1st Defendant that the Plaintiff's claim for damages, which they deny, is time barred by the provisions of section 4 (1) (d) of the Limitation of Actions Act. The 1st Defendant further avers that the Plaintiff's claim to reverse the 2nd Defendant's title to the suit property is incompetent in law. This is on the basis that the registration of the suit property was effected after the Plaintiff lost her equity of redemption.

12. On the other hand, the 2nd Defendant avers that he purchased his interest in the suit premises upon having been declared the highest bidder at the public auction held on 15th august 2001. The 2nd Defendant further avers that the said auction was advertised and conducted by Cash crop Auctioneers who duly issued a Certificate of sale.

13. It is the 2nd Defendant's case that he is a bona fide purchaser for valuable consideration, and acted in good faith. He denies any allegation of fraud and illegality. The Defendant avers that he purchased the suit property without any notice of fraud and his title to the same cannot therefore be impeached.

14. With regard to the 2nd Defendant's Counter-claim, he avers that he is the registered owner of the suit property since December 2001. Therefore, the Plaintiff is a trespasser having been notified of the change of ownership and refusing to vacate. It is the 2nd Defendant's case that the Plaintiff has trespassed on the suit property and therefore by way of this Counter-claim he claims from the Plaintiff the immediate delivery of vacant possession.

15. In summary, the 2nd Defendant prays that the Plaintiff's suit be dismissed with costs. He further seeks for orders of damages for trespass, mesne profits and costs of the Counter-claim.

16. The hearing of this matter commenced on 8th February 2012 with the Plaintiff's testimony as PW 1. It was her testimony that the suit property was registered in her name until 2001 when she was notified that the said property had been sold to the 2nd Defendant. She testified that she had guaranteed the loan facility of Kshs. 750,000 granted to Kevin Malinga by Trust Bank Limited. To that end she offered the suit property, her house then, to be charged to Trust Bank. It was however her testimony that what was released to the borrower was Kshs. 220,000/=.

17. The Plaintiff went ahead to testify that around 1997 she received a letter from the Bank that the borrower had not repaid the money as agreed. She however could not trace the borrower and ended up paying a total of Kshs. 45,000/-to the Bank. It was her testimony that the Bank was not sending her the Statements so she did not know whether or not the borrower was paying.

18. The Plaintiff testified that sometime in 1999 a friend informed her that the property had been advertised. When she went to the Bank she was told that the borrower had not repaid the loan. She went ahead and stopped the auction through Case No. 2059 of 1999. It is the Plaintiff's testimony that she agreed to pay the loan but that the bank did not give her statements to enable her know the outstanding amount. It is further her testimony that at the time of filing this suit she had paid a total of Kshs. 100,000/= to the Bank.

19. The Court was referred to a Notice dated 10th February 1999 written to the Plaintiff by the Bank's lawyer. It was the Plaintiff's testimony that she never received it. She confirmed that the said Notice was addressed to her. However, it was her testimony that the address used was P.O Box 47224 instead of her address which is 44590 as per the charge document. The Plaintiff testified that in March 2002 she received a letter from the lawyers telling her to vacate the house as it had been sold. The Plaintiff further testified that she did not receive any notice from the auctioneers that her property would be sold. She also testified that the Bank confirmed the sale of the suit property at Kshs. 1,600,000.

20. The Plaintiff testified that she came to Court to stop the eviction through CMCC No. 7347 of 2002. The eviction was stayed until the hearing of the current suit.

21. In her testimony, the Plaintiff urged the Court to return the suit property to her as she had been willing to repay the loan all along. It was her testimony that the sale of the suit property was not done in good faith. It was further her testimony that the sale was unlawful as she was not notified of the same.

22. On cross-examination, the Plaintiff testified that she had not been in contact with the borrower since she executed the charge document. The Plaintiff testified that she did not know if the loan facility had been repaid. She confirmed that she received a demand letter from Ndungu Njoroge and Kwach Advocates with regard to the default in repayment of the loan facility. She testified that in response to the said letter she paid Kshs. 45,000 to the Bank.

23. She further testified that after the sale of the suit property she was informed that there was a

balance of Kshs. 400,000/-. However, she opted not to take the money as she wanted the suit property. The Plaintiff confirmed that she paid a total of Kshs. 100,000/- towards the loan repayment. She also reiterated the fact that she never received any notice from the Bank of their intention to sell the suit property.

24. On re-examination, the Plaintiff testified that she did not receive the letter from P.L Mutuli & Co. Advocates as the address used in the letter was not hers (*see page 32 of the 1st Defendant's Bundle of Documents*).

25. The defence hearing commenced on 10th July 2012 with the 1st Defendant's case. The 1st Defendant called one witness, Mr. Adam Mohammed Boru. He introduced himself as the liquidation agent for Trust Bank Limited. He adopted his witness statement filed on 2nd May 2012 as part of his evidence in chief. He testified that the Plaintiff was the guarantor of the Loan granted to Kevin Malinga and that her property was charged to secure the same.

26. He further testified that the Bank continuously engaged the Plaintiff in correspondences and notices before the property was sold. He referred the Court to page 26 of the 1st Defendant's bundle of documents. There is a letter dated 15th August 1996 from the Bank's lawyers addressed to the Plaintiff demanding payment of the balance of the loan. The Court was also referred to a letter from the Plaintiff regarding the repayment of the loan at page 30 of the same bundle. DW 1 testified that he had not come across any complaints with regard to the bank statements either from the Plaintiff or the borrower.

27. On the issue of Notice, the Court was referred to page 32 of the bundle of documents. At the said page there is a Statutory Notice sent to the Plaintiff by the Bank's Lawyers P.M Mutuli & Co. Advocates. It is Mr. Boru's testimony that the auction was successful and the suit property was sold to the 2nd Defendant. It was also his testimony that Trust Bank Limited was placed under liquidation on 16th August 2001 and has not been trading as a Banking institution since then.

28. On cross examination, DW 1 testified that the borrower received statements every month indicating that the account was in arrears. He further testified that it is not the practice of banks to send statements to guarantors but only to the account holders. When referred to the Notice dated 10th February 1999, DW 1 confirmed that the address used was different from the Plaintiff's address as given in the charge document.

29. On re-examination, it was DW 1's testimony that the address used in the Notice dated 10th February 1999 was the same one appearing on the documents of title of the suit property as provided by the Plaintiff.

30. The 2nd Defendant testified on his own behalf. He adopted his witness statement filed in Court on 4th July 2011. The 2nd Defendant denied the allegations that he had colluded with the 1st Defendant to deprive the Plaintiff of her property. It was his testimony that when he participated in the auction he was declared the highest bidder. He further testified that he is the current owner of the suit property having been so registered in 2001.

31. The 2nd Defendant in his testimony indicated that he had filed a Counter-claim for vacant possession and urged the Court to grant him the same. He testified that he had not enjoyed the property since he bought it. The 2nd Defendant abandoned the prayer for mesne profits on the basis that the Valuer had not come to court to enable him prove the same.

32. On cross examination, the 2nd Defendant testified that he learnt about the auction of the suit

property in the newspapers. He further testified that before the auction he inspected the premises but the Auctioneers advised him not to enter in case of any hostility from the occupier. It was the 2nd Defendant's testimony that in 2002 he filed a suit for vacant possession which was stayed pending the outcome of the current suit.

33. On re-examination the 2nd Defendant confirmed that he personally attended the auction on 15th August 2001. He testified that there were other bidders at the auction. Subsequently the suit property was sold to him and the Bank transferred the property to him.

34. The Parties herein filed their submissions as directed by this Court.

35. I will begin with the undisputed facts. The Plaintiff was the registered owner of the suit property until 28th December 2001 when the said property was transferred and registered in favour of the 2nd Defendant. This was after Trust Bank sold the suit property to the 2nd Defendant by way of Public auction on 15th August 2001. The circumstances leading to the said transfer have already been stated in this Judgment and I wish not to repeat them.

36. It is also not in dispute that there was default in repayment of the loan. The Plaintiff was not being forthright in the Plaintiff when she averred that the loan had been repaid fully. This was made clear in her evidence when she admitted that she did not know if the loan facility had been repaid. She further confirmed that she had been informed by the bank that the borrower had defaulted in repaying the loan.

37. It was the Plaintiff's case that the Defendants colluded and fraudulently sold the suit property in an alleged public Auction. However, the Plaintiff did not give any evidence to prove the allegations of fraud and collusion. I will therefore not delve into the issue.

38. The main issue in contention, as I see it, is whether or not the 1st Defendant exercised its right to statutory power of sale in a regular manner. The Plaintiff contends that she was never served with the Mandatory Statutory Notice before the sale of the suit property. It is also the Plaintiff's contention that she was not served with the Notification of sale with regard to the auction and that no valuation was ever done on the suit property.

39. On the issue of valuation both the Plaintiff and the 1st Defendant did not give evidence on the same. The only evidence with regard to valuation is the witness statement of P.M Mwangi filed on 4th July 2011. However Mr. Mwangi did not testify during the hearing. Even so, the Plaintiff did not show any proof to the effect that the suit property was undervalued or that it was sold below market value.

40. It is the Plaintiff's case that in the Charge document which she executed on 23rd November 1995, she gave her postal address as P.O Box 44590, Nairobi. However, the 1st Defendant used the address that appeared in the Certificate of Lease which the Plaintiff claims is not hers, to send the Statutory Notice.

41. The general practice is that the address to be used by the Chargee to communicate to the Chargor is the one indicated in the charge document. It is only logical that the address given by the Chargor is the most current and in active use. In the event that the Chargor changes their address it is upon him/her to notify the Bank. In that case, I am of the view that there is no evidence that the requisite Statutory Notice was served upon the Plaintiff. Even if we were to go by the address used by the 1st Defendant to send the Notice of 10th February 1999, there is no evidence that the same was served upon the Plaintiff. The general rule is that where a letter is sent by registered post, there should be a certificate of posting to prove the same.

42. The above notwithstanding, it is clear from the evidence on record that the Plaintiff was aware of the default in repayment of the loan. This was way before the sale of the suit property on 15th August 2001. The Plaintiff filed a suit in HCCC 2059 of 1999 when the 1st Defendant threatened to sell the suit property. The Plaintiff was represented by a firm of Advocates. The Plaintiff recorded a consent making proposals on how she would repay the outstanding amount of the loan. At this point, it is only logical that the Plaintiff or her Advocates had become aware of the Statutory Notice. In the said consent, the 1st Defendant would be entitled to advertise and sell the suit property in the event that the Plaintiff defaulted in the repayments.

43. From the evidence on record, the Plaintiff defaulted on the Said arrangements. Subsequently, the 1st Defendant caused the property to be advertised and it was sold by way of public auction. It therefore follows that the 1st Defendant's right to exercise the statutory power of sale had arisen. The Statutory Notice issued by the 1st Defendant and dated 10th February 1999 gave the Plaintiff three months to redeem the property. (See page 32 of the 1st Defendant's bundle of documents). The 1st Defendant also issued a Notification of sale dated 23rd July 1999 to the Plaintiff's Advocates. (At page 35 of the 1st Defendant's bundle). Once a chargee has issued a regular Statutory Notice and a Notification of sale, there is no requirement that they re-issue the same whenever they want to sell the charged property. In a nutshell, it is the Court's finding that the 1st Defendant exercised its statutory power of sale regularly.

44. The fact that the said Notices were issued in 1999 and the suit property sold in August 2001 only shows that the 1st Defendant indulged the Plaintiff in redeeming the suit property.

45. In the event that the exercise of statutory power of sale by the 1st Defendant was irregular the Plaintiff's remedy would lie in an action in damages against the 1st Defendant. This is provided for under section 77 (3) of the Registered Land Act, Cap 300 (now repealed) which provides as follows:-

"A transfer by Chargee in exercise of his power of sale shall be made in the prescribed form, and the registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy only against the person exercising the power."

46. However, in the current case, the Plaintiff has not proved that the 1st Defendant's exercise of statutory power of sale was irregular. In any case, it is apparent on the record that the claim for damages is time barred. The suit herein was filed on 9th October 2008 while the public auction was held on 15th August 2001. This is over seven years since the cause of action arose. Under Section 4 (1) (d) of the Limitation of Actions Act, recovery of damages shall be commenced within 6 years from the date when the cause of action arose.

47. In conclusion, it is clear from the above observations that the Plaintiff has failed to prove her claim against the Defendants. In the circumstances, I make Judgement as follows:-

a. The Plaintiff's suit herein is dismissed.

b. Judgement is entered in favour of the 2nd Defendant against the Plaintiff in terms of the 2nd Defendant's counter-claim.

c. Each party shall bear own costs.

READ, DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Khasian holding brief for M/s Muteti for the Plaintiff

Mwangi for 1st Defendant for the Defendant

Teresia – Court Clerk



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