



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 447 OF 2005**

JOSPHAT RICHARD THUMBI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LIMITED....1<sup>ST</sup> DEFENDANT

NAOMI WANJIRU NJUGUNA.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. By an Amended Plaint dated and filed herein on 2<sup>nd</sup> May 2008 the Plaintiff seeks Judgment in the suit in the following terms:

- a. ***Special Damages of Shs.1,084,000/= until the Defendants deliver vacant possession of L.R NO.13767/131- Nairobi to the Plaintiff.***
- b. ***General Damages***
- c. ***Permanent injunction restraining the Defendants or their agents from evicting the Plaintiff from L.R. No. 13767/131 Nairobi.***
- d. ***An order declaring the sale of L.R NO.13767/131- Nairobi illegal and an order of taking of accounts.***
- e. ***An order cancelling the transfer of L.R. NO. 13767/131 Nairobi in the name of the 2<sup>nd</sup> Plaintiff and the discharge of the charge registered thereto.***
- f. ***An order that LR NO. 13767/131 be registered in the name of the Plaintiff.***
- g. ***Costs and interest.***

2. The brief facts of the suit, as emerge from pleadings are that on the 24<sup>th</sup> July, 1996 the Plaintiff created a Charge in favour of the 1<sup>st</sup> Defendant for Kshs.3,491, 260.00 which was secured by the property Land Reference Number 13767/131 Nairobi contained in the Certificate of Title as Number 70029 (***herein after the "Suit Property"***). The charge was duly registered at the Central Land Registry on the 30<sup>th</sup> July, 1996. The 1<sup>st</sup> Defendant alleges that the Plaintiff breached the said Charge by defaulting in the payments of the monthly instalment. The 1<sup>st</sup> Defendant made several request to the

Plaintiff to make good the default and he gave proposals which he also defaulted to meet. The 1<sup>st</sup> Defendant on 15<sup>th</sup> July, 2003 served the Plaintiff with the ninety days Statutory Notice. The Plaintiff continued being in default and the outstanding amount as at 30<sup>th</sup> June, 2005 was Kshs.15,863, 065.65. The Mortgage value of the Suit Property as at 14<sup>th</sup> September, 2004 according to the valuation Report by Tysons Limited with instructions from the 1<sup>st</sup> Defendant was Kshs.5,000,000.

3. On 1<sup>st</sup> March, 2005 the 1<sup>st</sup> Defendant in exercise their statutory power of sale entered into a private treaty with the 2<sup>nd</sup> Defendant who bought the suit property for a sum of Kshs.5,200,000.00 which amount was above the Mortgage value. The transfer was duly registered and endorsed on the certificate of title of the suit property on the 2<sup>nd</sup> June, 2005. On the 9<sup>th</sup> August, 2005 the Plaintiff filed a plaint which was amended on 2<sup>nd</sup> May, 2008 claiming that he had been duly servicing the advanced loan and had already repaid the sum to the tune of more than Kshs.4,200,000/- which was over and above the principal amount. He also claimed that the 1<sup>st</sup> Defendant overcharged him by sum of Kshs.11,720,604.70/-.

## EVIDENCE

4. In support of his case, the Plaintiff called a total of 4 witnesses, namely,

i. **PW1 E.W. Mugo (Auditor)**

ii. **PW2 David Chege Kariuki (Valuer)**

iii. **PW3 Plaintiff**

iv. **PW4 Geoffrey Erastus Sure (from Postal Corporation of Kenya).**

5. The 1<sup>st</sup> Defendant called one MIGUI MUNGAI while the 2<sup>nd</sup> Defendant adduced evidence herself. The Plaintiff's evidence is as contained in his Witness Statement dated 20<sup>th</sup> May 2011 and filed herein on 24<sup>th</sup> May 2011. The Plaintiff's case is that he had charged his property LR NO. 13767/131, Avenue Park Estate, Nairobi to the 1<sup>st</sup> Defendant, who financed the purchase of the same at a tune of Kshs.3,420,000/=. The Plaintiff continued making payments, but as time went by, the 1<sup>st</sup> Defendant would arbitrarily increase the interest rates and levy other illegal charges. The Plaintiff complained about the same, and the two parties entered into negotiations. However, while in the middle of the said negotiations with the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant acted illegally and in bad faith. It sold and transferred the said property to the 2<sup>nd</sup> Defendant. The said sale was conducted secretly and without issuance of the statutory notice to the Plaintiff. PW4 **Geoffrey Erastus Sure**, from Postal Corporation confirmed that the registered letters by the Defendants to the Plaintiff were returned to the sender.

Again the said property (which was allegedly sold to the 2<sup>nd</sup> Defendant at Kshs.5,200,000/=) was sold at a gross undervalue, which was below the marked price.

6. PW2, **David Chege Kariuki** gave evidence and produced a *valuation report (pages 55 – 59 of the Plaintiff's Bundle)* wherein he gave the value as at the time of sale to be Kshs.7,800,000/=. It was also the evidence of PW1, E.W, MUGO (auditor) that 1<sup>st</sup> Defendant had levied illegal charges in the Plaintiff's loan account. PW1 produced an *audit report dated 23<sup>rd</sup> October 2006 (page 60)* which showed that the 1<sup>st</sup> Defendant had overcharged the Plaintiff to the tune of Kshs.11,720,604/70.

7. The 1<sup>st</sup> Defendant's sole witness, MIGUI MUNGAI, a Legal Manager, told the Court in his Witness Statement filed on 20<sup>th</sup> April 2012 that the Plaintiff was advanced a loan to purchase the property, and that he defaulted, wherein the 1<sup>st</sup> Defendant issued him with 3 months' statutory notice, and

subsequently the 1<sup>st</sup> Defendant sold the property. It was the evidence of the said witness that as at the hearing of the suit, a sum of Kshs.10,665,286/= was outstanding. The witnesses further stated to the Court that before the property was sold, it requested for offers, and one person had offered to buy the said property at Kshs.5,800,000/= but the 1<sup>st</sup> Defendant sold it to the 2<sup>nd</sup> Defendant at Kshs.5,200,000/= as that was the market price.

8. The 2<sup>nd</sup> Defendant on her part adopted her witness statement filed on 3<sup>rd</sup> November 2014, which in essence was to the effect that she was a bona fide purchaser for value without notice. However, after cross examination, it emerged that the 2<sup>nd</sup> Defendant denied knowledge of the existence of this suit, until 2014, when she was asked to sign a witness statement. She admitted that the property was sold to her through the *Agreement for Sale dated 1<sup>st</sup> March 2005*, but she denied ever paying any deposit and admitted the entire purchase price was financed by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant also admitted that contrary to the terms in the agreement, the full purchase price was paid on 9<sup>th</sup> July 2005 as per the *Accounts Statement* which was produced by the 1<sup>st</sup> Defendant itself through the *Replying Affidavit of Joseph Kania dated 16<sup>th</sup> August 2005*. The purported sale was conducted outside the completion period in the Agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. The full purchase price should have been paid by 29<sup>th</sup> May 2005. It

9. Took the 2<sup>nd</sup> Defendant time to take possession after the Plaintiff vacated the premises. She did not know the person (**caretaker**) from the 1<sup>st</sup> Defendant who was taking care of the premises; and she admitted that any vandalism of the premises could have taken place after the Plaintiff had left when the 1<sup>st</sup> Defendant was in charge.

10. From the foregoing, it is the Plaintiff's case that the sale of the suit property was tainted with illegalities and mala fides, in that

- i. No Statutory Notice was issued to the Plaintiff,**
- ii. The sale was conducted secretly when negotiations were ongoing.**
- iii. There was conspiracy between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants so as to deprive the Plaintiff the property.**
- iv. Even the purported sale to the 2<sup>nd</sup> Defendant was done in breach of the Sale Agreement dated 1<sup>st</sup> March 2005 where full purchase price was paid late, and in deed was financed by the 1<sup>st</sup> Defendant.**
- v. The 1<sup>st</sup> Defendant's witness admitted that they had received an offer higher than what the 2<sup>nd</sup> Defendant purportedly paid. He was at a loss to explain why the 1<sup>st</sup> Defendant did not sell the property at Kshs.5,800,000/=, to that other person, but sold it specifically to the 2<sup>nd</sup> Defendant at Kshs.5,200,000/=, and who in deed did not have the money and had to be financed by the 1<sup>st</sup> Defendant. This confirms the evidence of PW2 (Valuer) that the correct value of the property was Kshs.7,800,000/=.**
- vi. The 1<sup>st</sup> Defendant illegally and unilaterally levied interests and other charges on the Plaintiff's loan account, as per the Audit report.**

11. It was submitted for the Plaintiff that the said illegalities went to the root of the purported sale, and that this Court has the jurisdiction to cancel the title, since the 2<sup>nd</sup> Defendant was not a bona fide purchaser for value. There was no sale between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and that the Plaintiff is entitled to the reliefs sought.

12. The Plaintiff's evidence was disputed by the 1<sup>st</sup> Defendant through their Amended Statement of Defence filed herein on 21<sup>st</sup> May 2008 where it denied all the allegations contained in the Amended Plaintiff including allegations of illegality and mala fides and stated that the Plaintiff was indeed given a loan of Shs.3,491,260/= as per the charge document but he failed to repay the loan, and did not pay the alleged Shs.5,600,000/=. The Defendant denied having overcharged the Plaintiff the sum of Kshs.11,720,604.70 or any sum of money, and that any interest charged on the Plaintiff's account was pursuant to the said charge. It is the 1<sup>st</sup> Defendant's case that upon Default the Plaintiff was served with a 3 month Statutory Notice which was served by way of registered post on 17.07.2003. The 1<sup>st</sup> Defendant also denies any negotiations between the Plaintiff and itself, except that upon default by the Plaintiff to pay the loan, the suit property was later sold by Private Treaty to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant's sole witness, MIGUI MUNGAI, a Legal Manager with the 1<sup>st</sup> Defendant, adopted his witness statement filed herein on 20<sup>th</sup> April 2012 and confirmed the elements contained in the Amended Defence for the 1<sup>st</sup> defendant. The witness testified that at the hearing of this suit the Plaintiff owed a sum of Kshs.10,665,286/= to the 1<sup>st</sup> Defendant. The witness also testified that before the property was sold, the 1<sup>st</sup> Defendant requested for offers, and one person had offered to buy the said property at Ksh.5,800,000/= but the 1<sup>st</sup> Defendant sold it to the 2<sup>nd</sup> Defendant at Shs.5,200,000/= as that was the market price. **See pg 75 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Bundle)**

### **DETERMINATION**

13. Parties filed submissions, which I have considered. From the Submissions and pleadings, this court raises the following issues for determination;

- a. whether the plaintiff is deserving of general or special damages;**
- b. whether valid statutory notices were served;**
- c. whether negotiations between parties affect the exercise of the power of sale;**
- d. whether a valid sale by private treaty and transfer can be set aside;**
- e. whether the plaintiff is entitled to injunctive orders; and**
- f. whether there was conspiracy to deprive the plaintiff of the suit property.**

### **WHETHER THE PLAINTIFF IS DESERVING OF GENERAL OR SPECIAL DAMAGES**

14. The Plaintiff in his prayers sought for special damages until the Defendants deliver vacant possession of the suit property to the Plaintiff and general damages. The 1<sup>st</sup> Defendant submitted that the Plaintiff did not provide any receipt or evidence for the same. In my view, it is settled Law that Special damages must not only be pleaded but should also be proved. Justice O.K. Mutungi in **Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR** stated that:

***"The claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed."***

Consequently, I agree with the 1<sup>st</sup> Defendant that this court cannot award damages where no documentary evidence supporting the same has been provided.

15. The Plaintiff has also sought an award of general damages. In this regard it is to be noted that the relationship between the Plaintiff and the 1<sup>st</sup> Defendant was a contractual relationship. The Court of Appeal in **Kenya Commercial Bank Ltd v Stephen Mukiri Ndegwa & another [2014] eKLR** relied on the Court's decision on **Dharamshi v. Karan [1974] EA 41** where it stated as follows:

***"This case has been accepted by this court as an authority for the proposition that***

***general damages cannot be awarded for a breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general.”***

In that regard it is the position of this court that general damages cannot be awarded, as the same must be quantified within the contract. This finding, is however, subject to the finding of this court under paragraph 19 hereunder.

#### **WHETHER STATUTORY NOTICES WERE SERVED.**

16. The Plaintiff alleged that he was not served with the statutory notice. The 1<sup>st</sup> Defendant stated that they served the Plaintiff with three month Statutory Notice dated 15th July 2003 by registered post through the last known address of the Plaintiff. It was DW1's evidence that the said letter was duly received by the Plaintiff. The 1st Defendant was issued with the certificate of posting a registered postal article. The same was produced before the court and found on page 65A of the 1st and 2nd Defendant List of documents. The submissions by the 1<sup>st</sup> Defendant that the Statutory Notice were issued is therefore correct, despite the testimony of the Plaintiff that he did not receive the letters. It must be noted that the Postal Office confirmed through a certificate of posting vide the address given by the Plaintiff that indeed a letter was posted to her. This court cannot go beyond that Certificate of Posting by denying the same.

#### **WHETHER THERE WERE NEGOTIATION**

17. The Plaintiff alleged that the suit property was sold during existence of negotiations between the parties. However there is no evidence of any negotiations. What was there is the evidence of the 1<sup>st</sup> Defendant particularly urging the Plaintiff to repay the loan. But even if there were any negotiations, the same would not stop a bank from exercising its statutory powers of sale unless those negotiations are couched and structured to achieve the said end.

#### **WHETHER THERE WAS CONSPIRACY TO DEPRIVE THE PLAINTIFF OF THE SUIT PROPERTY**

18. The Plaintiff submitted that the sale of the suit property to the 2<sup>nd</sup> Defendant was out of conspiracy and mala fides meant to deprive the Plaintiff of the suit property. However, in her Amended defence and in her evidence, the 2<sup>nd</sup> Defendant stated that she was not a party to the dealings between the Plaintiff and the 1<sup>st</sup> Defendant, and that she had never met the Plaintiff. The suit property was sold to her by Private Treaty pursuant to the exercise by the 1<sup>st</sup> Defendant of its Statutory Power of Sale. The 2<sup>nd</sup> Defendant gave evidence that she was an innocent Purchaser for value of the suit property.

19. This court found the evidence of the 2<sup>nd</sup> Defendant to be truthful. There was no evidence of conspiracy or malpractice. The suit property was sold to her at Shs.5,200,000/= despite there being a purchaser for the same at Shs.5,800,000/=. This was not her fault. Every Purchaser would prefer to purchase a property at a lesser sum of money if they can get it. However the sale of the suit property by the 1<sup>st</sup> Defendant at Shs.5,200,000/= while the 1<sup>st</sup> Defendant had an offer on record for Shs.5,800,000/= was an act in bad faith by the 1<sup>st</sup> Defendant. In the exercise of its Statutory Power of Sale, and in the sale under Private Treaty, the chargee is obligated to secure the best value for the property. If there is on record, like in the instant case, and this was admitted by DW1, an offer for Shs.5,800,000/= the bank was obligated to sell the suit property at that price instead of Shs.5,200,000/=. or at least give reasons why it preferred a lesser value. There was absolutely no reason given by the 1<sup>st</sup> Defendant why it decided to sell the property at Shs.5,200,000/= when it had on record an offer for Shs.5,800,000/=. This court can only conclude that the bank did not care. If that is so, then it is an action in bad faith, since the

same bank expected the Plaintiff to pay interests, other charges and penalties, on the said loan. Where did the bank expect the Plaintiff to get these extra levies from" A chargee exercising its power to sell by Private Treaty owes the Chorgor the duty to secure the best available deal, which is on record. The suit property having been sold to the 2<sup>nd</sup> Defendant must remain with the second Defendant. This sale cannot be reversed as there is no illegality on the part of the second Defendant. However, the 1<sup>st</sup> Defendant must refund the Plaintiff the Shs.600,000/= which the Plaintiff lost if the suit property was sold to the best offeror. Because it is not easy to understand why the 1<sup>st</sup> Defendant did this, its conduct can only be deemed to be in breach of the contract between it and the Plaintiff, under which contract it was the agent for the Plaintiff in the Sale of the suit property by Private Treaty and obligated to accept the best offer on record, or at least give sound, or any reason, for rejecting the best offer. In this regard, the said Shs.600,000/= is recoverable by the Plaintiff as quantified damages arising from the exercise of Statutory Power of sale Plaintiff's property by Private Treaty.

20. Arising from the foregoing paragraph of this Judgment, this court hereby enters Judgment as follows:

- i. Judgment is entered for the Plaintiff against the 1<sup>st</sup> Defendant in the sum of Kshs.600,000/= being damages for breach of contract on account of sum denied the Plaintiff by the 1<sup>st</sup> Defendant Pursuit to the sale of the Suit Property by Private Treaty.***
- ii. Interest on above at Commercial rate of 18% p.a from March 2005 to the date of full payment.***
- iii. The costs of this suit is given to the Plaintiff and shall be paid by the 1<sup>st</sup> Defendant.***

That is the Judgment of the court.

**READ, DELIVERED AND DATED, AT NAIROBI**

**THIS 4<sup>TH</sup> DAY OF MARCH 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

M/s Mumo for Plaintiff

M/s Karanu for Defendant

Teresia – Court Clerk



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