



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 163 OF 2007

PETER GICHORA MWAURA.....PLAINTIFF

- VERSUS -

JOSEPH WERU NDUNGO.....1ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA LTD.....2ND DEFENDANT

JUDGMENT

1. The plaintiff prays that the transfer of LR No 14225/122 in Kahawa West, Nairobi to the 1st defendant by the 2nd defendant be revoked. The 1st defendant purchased the property at an auction sale pursuant to the 2nd defendant's exercise of its statutory power of sale. The plaintiff contests that sale as unlawful as it was conducted without due notice and in a fraudulent manner. It was also the plaintiff's case that the property was sold at an undervalue. For those reasons, the plaintiff prayed that a permanent injunction be granted against both defendants from dealing with the suit property.

2. It is not disputed that the plaintiff borrowed a sum of Kshs 1,600,000 from the 2nd defendant bank towards purchase of the property. The total purchase price was Kshs 2,500,000. A charge securing the borrowing was created over the property. The plaintiff conceded that due to the tribal skirmishes in Nakuru in 1997, he was unable to service the loan as per the charge. The plaintiff was supposed to pay

Kshs 37,532 per month. At about the time of the sale of the property to the 1st defendant, he had only paid Kshs 180,000 to the bank. The plaintiff's testimony was that he never received the statutory notice for sale. He was also not served with a 45 days redemption notice by the auctioneers, Nguru Enterprises Auctioneers. When shown the copy of the statutory notice, the plaintiff confirmed that the postal address was his but he denied receiving it. The plaintiff had built a residential house, school and hostel on the suit property. His other witness, Duncan Mwangi, a registered valuer placed the value of the buildings, land and borehole at Kshs 4,800,000 as at the year 2009. He also valued structures that were demolished by the 1st defendant at Kshs 1,300,000 as more particularized in exhibit marked "PE 1". The valuer conceded the values would have been different in the year 2006 when the auction sale occurred and that the forced sale value would be 60% to 70% of those values. The property is a half acre and situated 5 km from Thika road and his analysis of the prices was informed by the cost of neighbouring properties in Mumbi Estate and Kahawa West Estate.

On cross-examination, the valuer appeared to have taken some matters for granted. For example, his report dated 20th March 2009 stated the title was freehold. He testified that it was registered under the Registered Land Act when in fact the title was leasehold under the Registration of Titles Act.

3. But going back to the plaintiff's evidence, the plaintiff did approach the bank to waive interest on the loan due to his financial predicament. He wrote a letter to that effect. The bank on 11th August 2002 wrote to him stating the loan offer would be cancelled. That is when he paid the Kshs 180,000 aforementioned. There was exhibited a letter dated 8th June 2004 by his lawyer. At that time, the plaintiff said he was under the impression that the offer had been cancelled and was waiting for the bank to reinstate it. He was also trying to sell another property in Buruburu to clear the debt. He received a letter dated 29th September 2005 from the bank in reply to his letter of 2nd August 2005 informing him that the bank would not reinstate the loan terms. His efforts to see bank officials did not bear fruit and the property was auctioned for Kshs 1,600,000 on 13th October 2006.

4. The 1st defendant's case is that he bought the property at a public auction for Kshs 1,600,000. The auction was by Nguru Enterprises Auctioneers acting under instructions of the 2nd defendant. He saw the advertisement of the sale in the Daily Nation newspapers of 11th October 2006 and upon enquiry from the auctioneers, he was referred to the 2nd defendant bank. On 13th October 2006, he deposited a sum of Kshs 700,000 with the bank before proceeding for the auction sale at Nacico Plaza. He said he was the highest bidder at Kshs 1,600,000. He was issued with a certificate of sale.

He was granted a loan by the 2nd defendant for the balance of the purchase price which loan he continues to repay. The bank executed a transfer by chargee in his favour which has been registered. He is not in possession of the property and he thus prayed that the plaintiff be evicted from the suit property. To the 1st defendant, the auction sale was thus regular and the plaintiff's suit should be dismissed.

5. The 2nd defendant called one witness Migwi Mungai who testified that the plaintiff was granted a loan of Kshs 1,600,000 on the security of a mortgage over LR 14 225/122. A charge dated 9th April 1998 was registered. The plaintiff defaulted on the terms of repayment. As at 18th May 2005, a sum of Kshs 7,185,371.95 was due and is the amount called up in the statutory notice. The notice was sent to his last address and which is also the address in the charge. (items 14 and 17 on plaintiff's list of documents). The notice was sent by registered mail. There is a certificate of posting. The 2nd defendant then instructed Nguru Enterprises Auctioneers who issued a 45 days redemption notice (exhibited as item 18 on list) and the accompanying certificate of postage. There is also at item 19 the auctioneers certificate under rule 15 (c) of the Auctioneers rules. The 2nd defendant states that

advertisements were done in the Daily Nation newspaper and the Standard newspapers. The auction sale took place on 13th October 2006. There was a reserve price of Kshs 1,300,000.

The 1st defendant who was the highest bidder paid Kshs 700,000 on the date of the auction and the bank financed the balance. The bank then executed a transfer by chargee dated 14th February 2007 which was registered on 27th February 2007. He denied collusion or the allegations of fraud. The advertisement in the Nation of 11th October 2006 was a follow up, he said. He confirmed that the 1st defendant paid Kshs 400,000 at the fall of the hammer and that the amount of Kshs 700,000 earlier deposited by the 1st defendant on that day was not a deposit for the auction. The money was paid into his account at the bank and later transferred to the bank for the purchase of the suit property when he became successful at the auction.

6. My view of the matter is this. It is common ground that at the plaintiff's request and instance, the 2nd defendant loaned him Kshs 1,600,000. As security for that lending, the plaintiff mortgaged his property LR No 14225/122 situated in Kahawa West, Nairobi. The terms of contract between the parties were contained in the registered charge instrument dated 9th April 1998 executed by both parties. I have found that the plaintiff failed to pay the monthly installments of Kshs 37,532 set out there on their due dates or regularly. The plaintiff conceded that he had financial constraints arising out of the tribal skirmishes in 1997. He had only repaid a sum of Kshs 180,000 to the 2nd defendant. Default having occurred, the bank became entitled under clause 7 (ii) of the charge and section 69 (1) of the Transfer of Property Act 1882 as amended by the Indian Transfer of Property Act (Amendment) Act 1959, Group 8 Laws of Kenya to realize the security. That section provides;

“69. (1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable”.

I hold similar view with Ringera J that when a mortgagor charges his property, he, *ipso facto* acknowledges that the charged property is available for sale in payment of the debt. The question then to determine is whether in exercise of its statutory power of sale, the 2nd defendant followed the mandatory procedures laid out by the statute and case law. Concomitant with that is whether the auction sale was valid and whether the sale to the 1st defendant was regular and lawful.

7. The plaintiff has in his written submissions prayed that the court takes judicial notice that in 2005, the postal corporation had introduced postal codes. The statutory notice bore the plaintiffs address but not the postal code. The plaintiff thus says this may explain why he did not receive either the statutory notice or the redemption notice. Inherent in that argument is that the notices may have been issued but he did not receive them. I have noted that both the statutory notice and the 45 redemption notice were sent to Postal Box 28390 Nairobi. That is the address the plaintiff gave in the letter of offer and the charge. It is also the address he used in his letter of 28th April 2004 seeking to reinstate the earlier terms of the loan and paying Kshs 180,000 being 10% of the loan. From the certificates of posting at items 14

and 19 of the plaintiffs list, and the one dated 6th April 2006 by Messrs Nguru Enterprises, I am satisfied that the statutory notice as well as the 45 redemption notice were issued and sent to the plaintiff's last known address. The statutory notice itself dated 18th May 2005 is for 3 months from the date of receipt. It complies with the requirements of section 69 A (1) of the Transfer of Property Act. See Trust Bank Ltd Vs George Ongaya Okoth Civil Appeal No 177 of 1998 (Court of Appeal, unreported).

The 45 days redemption notice issued by Nguru Enterprises also complies with the Auctioneers Act and rules. In particular, the auctioneer complied with rule 15 (c) of the Auctioneers Rules 1997. A letter sent by post is deemed to have reached the addressee within a few days of postage. True, the postal service introduced postal codes. They did not change the principal addresses. The postal codes were for the convenience of sorting out mail expeditiously. I do not accept the plaintiff's submission on that point.

8. That brings me to the auction sale. I am satisfied that upon issuance of the redemption notice, the auctioneers advertised the sale of the property in the Daily Nation and the Standard. The sale did not take place until after 15 days of the initial advertisement. I would find compliance with the Auctioneers Rules. The 1st defendant testified there were four bidders at the auction and he was declared the highest bidder. The plaintiff's witnesses did not controvert the occurrence of the auction or sale. The plaintiff seeks to impeach the entire process by disputing the service of statutory notice and alleging fraud or collusion. He who alleges fraud must prove it. See Koinange and 13 others Vs Koinange [1986] KLR 23. The standard of proof for fraud is very high approaching proof beyond reasonable doubt. See Ratilal Gordhanbhai Patel Vs Lalji Makanji [1957] E A 314, Urmila Mahindra Shah Vs Barclays Bank International and another [1979] KLR 67. It requires proof beyond the usual standard of balance of probabilities in civil cases. I have already dealt with service of that notice and the redemption notice. What troubles me a little is that the property was sold at Kshs 1,600,000 which from the valuer's evidence was low. The valuer's estimate was that the property in 2006 was worth about 3,500,000. But that would be the open market value whereas this was a forced sale value. The valuer did concede that forced sale value would be 60% to 70% of the market value. The valuer unfortunately struck me as a little casual. I have said earlier that his report stated the property was freehold and registered under the Registered Land Act. It was also only upon cross-examination that it occurred to him that the property was registered under the regime of Registration of Titles Act and was leasehold. That to me is a serious professional gaffe. I also noted that his valuation was conducted only on March 2009 and his estimates of value in the year 2006 were opinions from the witness box without more. I am thus, in the absence of other cogent evidence, unable to find that the sale was at such an undervalue as to be a fraudulent sale. I cannot also say that that value in 2006 was not the fair forced value at a public auction. The plaintiff did not lead evidence to demonstrate collusion between the bank, the auctioneer and the 1st defendant. The closest he came to it was in the cross-examination of the 1st defendant on the Kshs 700,000 be deposited at the bank before proceeding to the auction. The 2nd defendant's witness did clarify that that was not a deposit. If it were, I would be of a different mind. He said the 1st defendant was a customer of the bank and that the deposit at the auction was Kshs 400,000 transferred from the 1st defendant's account. The 1st defendant himself testified that he made that deposit into his account at the 2nd defendant's bank as he did not want to carry cash to the auction. In the absence of clear evidence by the plaintiff in rebuttal, and on the bases of the decided authorities cited above, I would find it difficult to find fraud based on mere suspicion. The particulars of fraud set out at paragraphs 7 to 10 of the amended plaint have thus not been proved.

9. In the deliberations above, I have answered all the first 7 issues framed by the parties. First I have found there was a public auction of the suit property. Secondly the ensuing transfer to the 1st defendant was lawful and not tainted by fraud. Thirdly, by virtue of that transfer, the plaintiff's right to the title to the suit property has been extinguished and his remedies would lie elsewhere. Section 69 B of the Transfer of Property Act has provisions for damages. See Downhill Limited Vs Harith Ali and another

Nairobi Civil Appeal No 254 of 1999 (Court of Appeal unreported). See also *Ze Yu Yang Vs Nova Industrial Products Limited* [2003] 1 E A 362 and 364. On issues 5, 6 and 7 I have found that both the statutory notice as well as the 45 day redemption notice were valid and were issued to the plaintiff before the sale and accordingly the 2nd defendants power of sale had crystallized. The plaintiff's equitable right of redemption was not then clogged.

Although the 1st defendant had prayed for damages in his amended defence, he did not lead evidence that would enable the court to assess such damages. At any rate, he did not plead or lead evidence of loss of Kshs 9,000 per month in rent cited in his submissions. I would dismiss that prayer in the circumstances.

10. I also find that in those circumstances the transfer of the property to the 1st defendant cannot be impeached. I would thus uphold the transfer by chargee dated 14th February 2007 and the entry on the title marked as number 4 registered on 27th February 2007 in favour of the 1st defendant. It thus follows that the plaintiff has not proved on a balance of probabilities the claim for the declaration or injunction sought at prayers (i) and (ii) of the amended plaint. In his submissions, the plaintiff prayed for an award of Kshs 4.1 million being the market value of the property when it was sold. There is however no prayer in the amended plaint for damages or at any rate for special damages in that sum. It is not possible to grant that prayer in the circumstances. It follows that the 1st defendant is thus entitled to the counterclaim at prayers (i) and (ii) of the amended defence and counterclaim dated 16th March 2009.

11. In the result, the plaintiff's suit is hereby dismissed. I allow the 1st defendant's counterclaim in terms of prayers (i) and (ii) in the amended defence and counterclaim dated 16th March 2009. Costs would normally follow the event. In this case, and in the interests of justice, it would be unfair to visit costs on the plaintiff who has lost his property. I will thus order that each party shall bear its own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 20th day of December 2011.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Peter Gichora Mwaura for the plaintiff.

Mr. Issa for Mrs. Macharia for the 1st Defendant.

Mr. Issa for the 2nd Defendant.



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