



Case Number:	Civil Case 415 of 2014
Date Delivered:	04 Mar 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Olga Akech Sewe
Citation:	Mwanyalo Fulgence Lenjo & another v Cfc Stanbic Bank Limited [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Court allows the Applicants' application
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 415 OF 2014

MWANYALO FULGENCE LENJO.....1ST PLAINTIFF/APPLICANT

MOINKETT FAITH NASEI.....2ND PLAINTIFF/APPLICANT

VERSUS

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

1. The application dated 16th October 2015 was filed pursuant to Order 1 Rule 10(4) and Order 8 Rule 3 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. The orders sought thereby are:

a. **That the court be pleased to grant leave to the Plaintiffs/Applicants to amend their Plaint dated 28th May 2014 in terms of the draft Amended Plaint annexed to the application.**

b. **That the Defendant/Respondent be granted corresponding leave to file and serve an Amended Defence upon service of the Plaintiff's amended Plaint.**

c. **That the cost of the Application be in the cause.**

2. The Plaintiffs/Applicants (hereinafter referred to as the Applicants) filed this suit on 16th September 2014 seeking judgment against the Defendant/Respondent (hereinafter "the Respondent") for, *inter alia*, the discharge and release of Title Deed for Sectional Property No. **Nairobi Block 22/1118/21 - Unit Number 21 and 244 SUNNING HILLS KILELESHWA** (the suit property). The property had been charged to the Respondent for a house purchase loan of **Kshs. 9,600,000**, with which the Applicants bought the suit property. It is common ground that the Applicants fell in arrears in repaying the loan,

whereupon, the Respondent caused the suit property to be advertised for sale by public auction on 7th September 2012, after the requisite statutory notices had been given.

3. According to the Applicants' pleadings, that sale as well as another auction set for 12th July 2013, did not materialize; and that on the sides, they engaged the Respondent with a view of having the suit property sold by private treaty for about **Kshs. 14,750,000** for which purpose, the firms of **Wesonga & Co. Advocates** and **Raffman Dhanji Elms & Virdee Advocates** were retained. The vendors' and purchasers' Advocates finalized the negotiations that culminated in a Contract of Sale dated 2nd December 2013; and that all these developments were communicated to the Respondent and appropriate professional undertakings provided that would have ensured that the outstanding loan was promptly cleared upon finalization of the contract of sale. It was the case of the Applicants that, to their disappointment, when the Respondent was called upon to discharge and release the title documents, it declined to do so; hence this suit.

4. Contemporaneously with the Plaint, the Applicants filed a Notice of Motion Application seeking orders directing the Respondent to release the title documents along with a Discharge of Charge within 14 days. It was in response to that Notice of Motion that the Respondent, through the Replying Affidavit sworn by its Recoveries Officer, **Mr. Boniface Machuki** on 30th October 2014, deposed that the property that is the subject of this suit was sold by public auction on **7th September 2012** by the proposed 2nd and 3rd Defendants to the proposed 4th Defendant.

5. While that Application was pending hearing, the Applicants filed the instant Application by way of Chamber Summons on 16th October 2015 seeking leave to amend the Plaint. According to the Applicants, it is now essential to amend the Plaint to plead aspects of fraud against the Defendant/Respondent and to include additional parties, namely **Galaxy Auctioneers, Sheflo Auctioneers** and **Esther W. Wekesa** as 2nd, 3rd and 4th Defendants, respectively, following the revelation by the Respondent's Recoveries Officer, **Mr. Boniface Machuki** in the Replying Affidavit sworn on 30th October 2014, that the property that is the subject of this suit was sold by public auction on **7th September 2012** by the proposed 2nd and 3rd Defendants to the proposed 4th Defendant.

6. This change of tack on the part of the Applicants appears to in no way suggest a concession by the Applicants that there was a valid sale by public auction on the 7th September 2012, as is alleged by the Respondent. This is discernible in paragraphs 20C to 23 of the draft Amended Plaint, in which the Applicants have alleged fraud on the part of the proposed Defendants in collusion with the Respondent, in the manner in which the suit property was allegedly sold. To this end, the Applicants took issue with the following:

a. in the Respondent's purporting to have sold the suit property by public auction on 7th September 2012, while at the same time proceeding to advertise the property for sale by public auction on 12th July 2013;

b. in the Respondent allowing the 4th proposed Defendant to make payment for the purported sale by instalments spanning the period 15th January 2013;

c. in the continued and uninterrupted possession by the Applicants of the suit property until February 2014 when their tenants were forcibly evicted by the Respondent.

It is for the foregoing reasons that the Applicants now seek leave to amend the Plaintiff to claim special, exemplary and general damages along with mesne profits of Kshs. 75,000 per month from March 2014 until the date of judgment.

7. The Respondent opposed the application and relied on the Replying Affidavit sworn by **Ann Kaswii Muli** on 4th November 2015. She reiterated the earlier averments in the affidavit of **Boniface Machuki**, which basically is that the Applicants sought and were granted a loan facility of **Kshs. 9,600,000** by the Respondent, and that as security for the said loan, the Applicants executed a Charge over the suit property. When the Applicants defaulted in payment of the said loan, the Respondent instructed its Advocates to issue a Statutory Notice of Sale for recovery of the whole of the outstanding amount, then standing at **Kshs. 10,481,394**. She further deposed that the Applicants did not rectify their default within the three months window provided, and in consequence thereof, its Advocates issued instructions to Galaxy Auctioneers to issue the 45 days' Notification of Sale and to proceed to advertise and sell the property; and that it was thereupon that the property got to be sold on the 7th September 2012 to **Esther W. Wekesa**, the proposed 4th Defendant, after the Applicants failed to redeem the property.

8. With regard to the payment of the purchase price by **Esther W. Wekesa**, it was deposed that she made three instalment payments between 15th January 2013 and 8th May 2013, and that the rest of the purchase price was financed by Kenya Commercial Bank. Thus, according to the Respondent, the transaction was completed and transfer effected; and since there is no justification for the joinder of the intended parties, the application should be dismissed with costs.

9. The court has considered the respective positions taken by the parties, as borne out of their affidavits and submissions, in the light of the provisions of Section 3A of the Civil Procedure Act, Order 1 Rule 10(4) and Order 8 Rule 3 of the Civil Procedure Rules and the authorities relied on by Learned Counsel.

10. Rule 3 of Order 8 of the Civil Procedure Rules donates the discretion to the Court to permit any party to amend his pleadings at any stage of the proceedings and in such a manner as it may direct, provided that this is done on such terms as to costs or otherwise as may be just. To this end the general principle, as was observed by the Court of Appeal in the case of **Central Kenya Limited Vs Trust Bank Limited (2000) 2 EA 365** is that:

“...all amendments should be freely allowed at any stage of the Proceedings provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated in costs.... The overriding considerations were whether the amendments were necessary for the determination of the suit.” (see also **Eastern Bakery v Castelino [1958] 1 EA 461**)

11. The Applicants have endeavoured to convince the court that they have a good case to warrant the amendment sought; firstly that it was with the knowledge of the Respondents that it engaged in negotiations for sale of the suit property by private treaty. The Applicants left the court in no doubt that they were well alive to the reality that it was impossible for them to sell the property by private treaty without the express consent of the Respondent as the Chargee, and that they kept the Chargee

informed of its efforts to sell the property at the best possible price.

12. Secondly, and as submitted by Counsel for the Respondent, it is trite law that a sale by public auction becomes absolute at the fall of the hammer and that thereupon the chargor's right of redemption is extinguished (Per the cases of **Captain Patrick Kanyangia vs. Savings & Loans & 2 Others Civil Appeal No. 150 of 1993; David Mose Bichanga vs. Savings & Loans Kenya Ltd and 2 others [2007] eKLR**). Nevertheless it is observable that whereas the Respondent now alleges that the property was sold by public auction on the 7th September 2012, it is inexplicable why no payment, even by way of a deposit of a percentage of the sale price, was made at the fall of the hammer. It is instructive to note, and this is a fact borne out of the Replying Affidavits filed by the Respondent, that the first instalment payment allegedly made by the proposed 4th Defendant, **Esther W. Wekesa**, was only made on 15th January 2013, almost 5 months after the fall of the hammer; and that by 8th May 2013 only Kshs. 5,115,000 had been paid, such that the balance had to be offset by a loan from Kenya Commercial Bank. The court's attention was similarly drawn to a second advertisement for sale dated 12th July 2013 allegedly by **Sheflo Auctioneers**, the proposed 3rd Defendant, which advertisement would be incongruent with the contention that the sale had already taken place in 2012.

13. In my view therefore, the Applicants have good reasons to be concerned that the alleged sale by auction could be a feigned affair. More so because they did receive a letter from the Respondent dated 19th July 2013 expressly notifying them that the loan was still outstanding and attracting interest. Moreover, an official search at the Registry of Lands as at 11th December 2013 reflected that the property was still charged by the Applicants to the Respondent, one year and three months after the fall of the hammer.

14. In the premises, granted the firm position taken by the Respondent that the property had already been sold, I would agree with the Applicants that it has since become necessary for the Applicants to re-think the relief they wish to obtain from the court; and that this change of tack has been made manifest in the proposed Amended Plaintiff. The court is further satisfied that the proposed amendments have indeed been triggered by the position taken by the Respondent in the matter, as brought out in the two Replying Affidavits filed herein on its behalf. Indeed in the **Eastern Bakery Case** that was relied on by the Respondent, the court was of the view that:

"Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs."

15. As to whether the Respondent will be prejudiced, it is noted that it is yet to file its Defence. Its Counsel pitched a strong argument, relying on Sections 99 and 104 of the Land Act, 2012, which provides for the rights of a Chargor that is aggrieved by what he perceives to be an improper exercise of the Chargee's power of sale and the remedies available therefor. Clearly, the Respondent is well steeled for the contest and its natural consequence and no prejudice will be suffered by it for which costs would be considered inadequate compensation.

16. In urging the court to disallow the application, Counsel for the Respondent relied on the authority of **Abdul Karim Khan v Mohamed Roshan [1965] 1 EA 289** in which it was held that it would be improper to allow amendments whose effect would be to introduce fresh matters in the pleadings or create inconsistency in the pleadings. Counsel thus argued that the effect of the proposed amendment sought

by the Applicants would be to introduce fresh matters in this suit. I have no hesitation in rejecting this argument, noting that it has been overtaken by the enactment of the Civil Procedure Act and the Civil Procedure Rules, 2010. Rule 3(5) of Order 8 in particular provides that:

"An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."

17. As pointed out hereinabove, the Applicants have had to reconsider their options upon receiving notice of the Respondent's response to his cause of action for discharge and release of title deed to a cause of action for damages pursuant to section 99 of the Land Act. It cannot be gainsaid that the latter cause of action arises out of the same facts or substantially the same facts as the former one.

18. The second aspect of the Applicant's application relates to the application for joinder of additional parties, namely the two Auctioneers that allegedly sold the property, **Galaxy Auctioneers** and **Shelfo Auctioneers**, as well as the purchaser, **Esther W. Wekesa** as 2nd, 3rd, 4th Defendants herein. The Applicants' case against them as brought out in the draft Amended Plaintiff is that they colluded to fraudulently contrive the alleged sale of 7th September 2012.

19. The Respondent on the other hand contended that the suit property having been properly sold, any alleged irregularities can only constitute a cause of action, pursuant to Sections 99 and 104 of the Land Act, 2012, against the Respondent herein on whose instructions the proposed 2nd and 3rd Defendant acted. Relying on the case of **Mwambeja Ranching Co. Ltd & Another v Kenya National Capital Corporation Ltd & 6 Others [2015] eKLR** for the principle that where there is a disclosed principal there is no need to rope in the agent, Counsel for the Respondent argued that the application to enjoin the proposed three additional defendants is unwarranted and should therefore be refused.

20. I have given due consideration to these arguments and would agree that Section 99(4) of the Land Act does provide that after the sale of charged property, any aggrieved chargor's only right is in a claim for damages, which is what the Applicant's now seek to pursue. It must however, be noted that the protection excludes fraudulent transactions, as has been alleged herein. Section 99(3) of the Land Act is clear in terms, and it provides thus:

"A person to whom this section applies is protected except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice."

It is manifest therefore that where fraud is alleged, then it is only fair and just that each of the parties against whom such fraud is pleaded be enjoined to answer to those allegations. I therefore fully associate myself with the view taken by **Mutungi J** in similar circumstances in the case of **Martin Wesula Machyo vs. Housing Finance Co. of Kenya Ltd and Nguru Enterprises [2015] eKLR** thus:

"The Plaintiff has made allegations of fraud against the Defendants and has further contended

that the purported sale of the suit property was irregular, unlawful and null and void *ab initio*. A determination thereof and the remedies available to the Plaintiff can only be discerned after a full trial. The 1st Defendant contends that the proposed 3rd Defendant is an innocent purchaser for value who is protected by Section 99 of the Land Act. That section does not offer protection to a purchaser where there is fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive notice. These issues can only be determined at the trial where the proposed 3rd defendant is afforded an opportunity to participate and respond to the issues. It is therefore only fair and just to join the proposed 3rd Defendant to avert a situation where adverse orders affecting his title may be issued without him being given an opportunity to be heard...."

21. It is for this reason that I find that in circumstances of this case, it is imperative that the agents be impleaded alongside their Principal, the Respondent herein to enable the court to effectually and conclusively determine all the issues in controversy herein.

22. The foregoing being my view of the matter, I would allow the Applicants' application dated 16th October 2015 and grant the following orders:

- a. Leave be and is hereby granted to the Applicants to amend their **Plaint** in the terms proposed in the draft Amended **Plaint**;
- b. **The Amended **Plaint** be filed and served within 14 days from the date hereof;**
- c. **The Defendant/Respondent to be at liberty to file Defence in response within 14 days of service of the Amended **Plaint**;**
- d. **Costs of the application to be in the cause.**

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS DAY OF JANUARY 2016

OLGA SEWE

JUDGE

DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH 2016

CHARLES KARIUKI

JUDGE



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