



Case Number:	Civil Case 447 of 2005
Date Delivered:	04 Mar 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Judgment
Judge:	Eric Kennedy Okumu Ogola
Citation:	Josphat Richard Thumbi v Housing Finance Company (K) Limited & another [2016] eKLR
Advocates:	M/s Mumo for Plaintiff M/s Karanu for Defendant
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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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....1ST DEFENDANT

NAOMI WANJIRU NJUGUNA.....2ND DEFENDANT

JUDGMENT

1. By an Amended Plaint dated and filed herein on 2nd 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 2nd 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 24th July, 1996 the Plaintiff created a Charge in favour of the 1st 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 30th July, 1996. The 1st Defendant alleges that the Plaintiff breached the said Charge by defaulting in the payments of the monthly instalment. The 1st Defendant made several request to the Plaintiff to make good the default and he gave proposals which he also defaulted to meet. The 1st Defendant on 15th July, 2003 served the Plaintiff with the ninety days Statutory Notice. The Plaintiff continued being in default and the outstanding amount as at 30th June, 2005 was Kshs.15,863, 065.65. The Mortgage value of the Suit Property as at 14th September, 2004 according to the valuation Report by Tysons Limited with instructions from the 1st Defendant was Kshs.5,000,000.

3. On 1st March, 2005 the 1st Defendant in exercise their statutory power of sale entered into a private treaty with the 2nd 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 2nd June, 2005. On the 9th August, 2005 the Plaintiff filed a plaint which was amended on 2nd 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 1st 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 1st Defendant called one MIGUI MUNGAI while the 2nd Defendant adduced evidence herself. The Plaintiff's evidence is as contained in his Witness Statement dated 20th May 2011 and filed herein on 24th May 2011. The Plaintiff's case is that he had charged his property LR NO. 13767/131, Avenue Park Estate, Nairobi to the 1st 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 1st 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 1st Defendant, the 1st Defendant acted illegally and in bad faith. It sold and transferred the said property to the 2nd 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 2nd 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 1st Defendant had levied illegal charges in the Plaintiff's loan account. PW1 produced an *audit report dated 23rd October 2006 (page 60)* which showed that the 1st Defendant had overcharged the Plaintiff to the tune of Kshs.11,720,604/70.

7. The 1st Defendant's sole witness, MIGUI MUNGAI, a Legal Manager, told the Court in his Witness Statement filed on 20th April 2012 that the Plaintiff was advanced a loan to purchase the property, and that he defaulted, wherein the 1st Defendant issued him with 3 months' statutory notice, and subsequently the 1st 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 1st Defendant sold it to the 2nd Defendant at Kshs.5,200,000/= as that was the market price.

8. The 2nd Defendant on her part adopted her witness statement filed on 3rd 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 2nd 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 1st March 2005*, but she denied ever paying any deposit and admitted the entire purchase price was financed by the 1st Defendant. The 2nd Defendant also admitted that contrary to the terms in the agreement, the full purchase price was paid on 9th July 2005 as per the *Accounts Statement* which was produced by the 1st Defendant itself through the *Replying Affidavit of Joseph Kania dated 16th August 2005*. The purported sale was conducted outside the completion period in the Agreement between the 1st and 2nd Defendant. The full purchase price should have been paid by 29th May 2005. It

9. Took the 2nd Defendant time to take possession after the Plaintiff vacated the premises. She did not know the person (**caretaker**) from the 1st 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 1st 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 1st and 2nd Defendants so as to deprive the Plaintiff the property.***

iv. ***Even the purported sale to the 2nd Defendant was done in breach of the Sale Agreement dated 1st March 2005 where full purchase price was paid late, and in deed was financed by the 1st Defendant.***

v. ***The 1st Defendant's witness admitted that they had received an offer higher than what the 2nd Defendant purportedly paid. He was at a loss to explain why the 1st Defendant did not sell the property at Kshs.5,800,000/=, to that other person, but sold it specifically to the 2nd Defendant at Kshs.5,200,000/=, and who in deed did not have the money and had to be financed by the 1st Defendant. This confirms the evidence of PW2 (Valuer) that the correct value of the property was Kshs.7,800,000/=.***

vi. ***The 1st 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 2nd Defendant was not a bona fide purchaser for value. There was no sale between the 1st and 2nd Defendants, and that the Plaintiff is entitled to the reliefs sought.

12. The Plaintiff's evidence was disputed by the 1st Defendant through their Amended Statement of Defence filed herein on 21st May 2008 where it denied all the allegations contained in the Amended Plaint 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 1st 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 1st 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 2nd Defendant. The 1st Defendant's sole witness, MIGUI MUNGAI, a Legal Manager with the 1st Defendant, adopted his witness statement filed herein on 20th April 2012 and confirmed the elements contained in the Amended Defence for the 1st defendant. The witness testified that at the hearing of this suit the Plaintiff owed a sum of Kshs.10,665,286/= to the 1st Defendant. The witness also testified that before the property was sold, the 1st Defendant requested for offers, and one person had offered to buy the said property at Ksh.5,800,000/= but the 1st Defendant sold it to the 2nd Defendant at Shs.5,200,000/= as that was the market price. ***See pg 75 of the 1st and 2nd 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 1st 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 1st 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 1st 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 1st 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 1st 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 1st 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 2nd 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 2nd Defendant stated that she was not a party to the dealings between the Plaintiff and the 1st 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 1st Defendant of its Statutory Power of Sale. The 2nd Defendant gave evidence that she was an innocent Purchaser for value of the suit property.

19. This court found the evidence of the 2nd 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 1st Defendant at Shs.5,200,000/= while the 1st Defendant had an offer on record for Shs.5,800,000/= was an act in bad faith by the 1st 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 1st 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 2nd 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 1st 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 1st 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 1st Defendant in the sum of Kshs.600,000/= being damages for breach of contract on account of sum denied the Plaintiff by the 1st 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 1st Defendant.***

That is the Judgment of the court.

READ, DELIVERED AND DATED, AT NAIROBI

THIS 4TH 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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