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Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Milton Stephen Asike-Makhandia
Citation:	DAVID ONCHARI NYAKUNDI v BARCLAYS BANK OF KENYA LTD & 2 others [2010] eKLR
Advocates:	-
Case Summary:	-
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County:	Kisii
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Advocates Against:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 519 OF 1995

DAVID ONCHARI NYAKUNDI.....
.....**PLAINTIFF**

-VERSUS-

LTD.....
BARCLAYS BANK OF KENYA
DEFENDANT.....**1st**

MONANI.....
YUKABETH KWAMBOKA
DEFENDANT.....**2nd**

AUCTIONEERS.....
ALFRED SAGWA T/A PAVE
DEFENDANT.....**3rd**

JUDGMENT

The plaintiff has sued the defendants jointly and severally for:-

“a. A declaration that there was no public auction of the plaintiff’s parcels Nos. Nyaribari Chache/B/B/Boburia/ 3783 and 3830.

b. An order nullifying the said sale and subsequent transfer to the 2nd defendant the plaintiff’s said parcels of land.

c. A declaration that the sale of the plaintiff’s said two parcels of land was carried out improperly, irregularly and in bad faith and without taking into account the plaintiff’s interests.

d. An order allowing the plaintiff to redeem’s (sic) said two parcels of land by payment to the 1st defendant all the balance of the sum secured as at 26th May, 1994.

e. General damages.

f. Costs of this suit.

g. Interest thereon at court rates.

h. Such further or other relief as this honourable court may deem fit to grant....”

According to the plaint the suit was necessitated by the fact that the plaintiff was the registered proprietor of land parcels Nos **Nyaribari Chache/B/B/Boburia/1383** and **Nyaribari Chache/B/B/Boburia/3830** hereinafter ***“the suit premises”***. He charged them to the 1st defendant to secure various advances made to him by the said defendant at various times all of which he allegedly

repayed except the last advance of Kshs. 400,000/= which he partly repaid and was still in the process of repaying by 26th May, 1995. With regard to **Nyaribari Chache/B/B/Boburia/ 3830** however, it is the plaintiff's case that though he charged the same to the 1st defendant as security for an advance of Kshs. 100,000/= on or about 28th May, 1991, the said advance was never released to him.

On or about 21st March, 1994, the 3rd defendant on the instructions of the 1st defendant advertised the sale by Public auction of the suit premises on 22nd April, 1994. According to the plaintiff the public auction never took place. Instead and through fraudulent machinations intended to defraud him of the suit premises, the defendants jointly conspired and sold secretly the suit premises to the 2nd defendant in the total sum of Kshs. 400,000/=. As a result of the foregoing he had suffered loss and damage. In the alternative, the plaintiff pleaded that the 1st defendant irregularly and improperly sold the suit premises at an unrealistic market price without taking into account their appreciative value, without considering the plaintiff's interest therein and as a result had caused him great loss and damage.

The defendants in response to the suit initially filed a joint statement of defence through **Messers G.J. Mainye Advocate**. Their defence was that though the plaintiff charged the suit premises to the 1st defendant to secure financial accomodation extended to him, he had defaulted in the repayment leading to the 1st defendant's exercising its statutory powers of sale as provided for under the Registered land Act. They all denied the allegations of fraud attributed to them by the plaintiff and instead stated that the Public auction was conducted on 22nd April, 1994 outside Kisii post office by 3rd defendant and attended by a representative of the 1st and 2nd defendants as well as the plaintiff's whereupon the 2nd defendant was declared to be the highest bidder and bonafide purchaser for value at the said Auction. Soon after the fall of the hammer, the 2nd defendant paid the required 25% deposit of the purchase price and within the stipulated period paid off the balance contrary to the allegations by the plaintiff that the purchase price was paid over a period of 6 months. They further averred that all legal requirements were complied with in selling the suit premises and denied bad faith, irregularities and or any secret dealings after 22nd April, 1994. As far as they were concerned the suit premises were sold at a realistic and reasonable price at a public auction and that such price was arrived at after taking into account all relevant factors including the plaintiff's interest. Thereafter the 1st defendant transferred the suit premises to the 2nd defendant who had acquired little to the same. Finally, and in particular, the 1st defendant, pleaded that the plaintiff had been notorious in bringing several suits against it regarding the suit premises to wit, **HCCC.NO. 432 of 1993, HCCC.NO. 256 of 1994** and now this suit. Accordingly, this suit had been brought in bad faith.

The hearing of the suit commenced before **Mbaluto J** (as he then was) on 15th April, 1997. The plaintiff testified and called one witness. His testimony was that he was previously the registered purchaser of **Nyaribari Chache/B/B/Boburia/3783**. In 1987 and over a period of time he obtained loans totalling of Kshs. 880,000/= from the 1st defendant and used it as security. He made several repayments towards the satisfaction of the loan. However along the way, he fell into arrears and was unable to repay the loan which then stood at Kshs. 400,000/=. The 1st defendant then wrote to him letters demanding payment but he was unable to. He pleaded with it to reduce the monthly repayments as he was sick to no avail. He also charged **Nyaribari Chache/B/B/3830** to the 1st defendant for Kshs. 300,000/=. However the defendant never advanced him the money. Upon receipt of the statutory Notice, he unsuccessfully tried to negotiate with the 1st defendant's bank manager. When the 1st defendant advertised the suit

premises for sale, he filed suit against it being **HCCC.NO. 432 of 1993** to stop the sale. He was successful. A consent order was subsequently recorded in the suit with regard to the mode of repayment. He abided by the terms of the consent until 1994 when again he received a Notice from the auctioneer to the effect that the suit premises were up for on 22nd April, 1994 outside Kisii Post office. He did nothing upon receipt of the Notice aforesaid as he was unwell. On the day of the auction he was in Nakuru on treatment for asthma. He instead requested his brother, **Samson Nyambati** (PW2) to attend the auction on his behalf. Eventually, when he came back from Nakuru, his brother told him that no auction had taken place. He then decided to sell **Nyaribari Chache/B/B/3830** to his very same brother. In the process he bumped into **Mr. Mainye**, advocate, in the streets of Kisii who informed him that the suit premises had been auctioned. Between 22nd April, 1994 and the time he was informed as aforesaid he had continued to make payments to the 1st defendant totaling about Kshs. 3,600/= on account of the loan. On being informed that the auction had taken place, he went to the 1st defendant to check whether the proceeds of sale if at all had been deposited or credited to his account and found no such evidence. It was not until later in the year and having obtained a statement that he noticed a deposit made on 7th June, 1994 of Kshs. 130,000/=. The balance of Kshs. 390,000/= was paid on 10th December, 1994. At this juncture the witness was stood down for further hearing.

When the case next came up for hearing on 20th May, 1998, the plaintiff and his counsel were all absent. On the application of counsel for the defendants, the suit was dismissed with costs. Subsequent thereto parties recorded a consent order on 22nd June, 1998 in which the order of dismissal aforesaid was set aside on condition that the plaintiff paid the defendants costs. This was done and on 4th September, 1998, the hearing of the case resumed.

It was the plaintiff's further testimony that when he charged **Nyaribari Chache/B/B/Boburia/3783** in 1990 it was valued at Kshs. 500,000/=. However it was sold for only Kshs. 400,000/=. According to him its value should have appreciated. He subsequently commissioned a valuer to revalue the suit premises. This was done on 11th April, 1995 and the premises were valued at Kshs. 723,000/=. At the time of the alleged auction the premises had on it 2 bedroomed permanent houses. There was only one house on the premises when the 1st defendant valued it in 1990. Thus the premises were not sold at a realistic market value. The price was not fair at all and his interest was not taken into account. The other suit premises, **Nyaribari Chache/B/B/3830** was charged to the 1st defendant in 1992 for an additional loan of Kshs. 500,000/=. However he never got the money. He had surrendered the title to the 1st defendant though. The premises were never valued though he understood that it was sold at Kshs. 100,000/=. It measures 1.0 hectares. It was undeveloped. Through his own valuer again, the premises were valued at Kshs. 489,000/=. He therefore prayed to court to declare that there was no auction and that the purported sale if at all, ought to be nullified so that he could redeem the suit premises.

Cross-examined by **Mr. Mainye**, learned counsel for the defendants, the plaintiff stated that he had voluntarily charged the suit premises to the 1st defendant. He conceded as well that he had defaulted in the repayments and he was aware that such default would attract the suit premises being sold by public auction by the 1st defendant. When he defaulted, he received a Notice of the default and was also notified that the securities would be sold. Though he claimed to have seen the branch manager of the 1st defendant and an agreement struck as to how he would pay the arrears, there was no documentary evidence to that effect. On expiry of the statutory notice, the suit premises were advertised and he was served with a notice of sale. He learnt that the suit premises were sold after 22nd April, 1994. However he did not file any complaint or a suit until October, 1995. The delay was occasioned by the fact that he was

consulting with his lawyers over the issue. He had objected to the transfer of the suit premises to the defendant at the land control board twice. He was not aware that the land control board rejected his objections although it had advised him to go to court. He was also not aware that the suit premises were now registered in the name of the 2nd defendant. He did not attend the auction as he was attending clinic at Nakuru. However he had no documents to attest to this fact.

After the conclusion of the plaintiff's testimony, **Mr. Mainye** applied to interpose the evidence of the 2nd defendant as she was due to leave for USA to join her husband. As the request was not opposed, it was granted.

The 2nd defendant then testified as follows; that in April, 1994, she read an advertisement in the papers with regard to a public auction to be held on 22nd April, 1994. She was interested and therefore came to Kisii from Kilgoris where she was then working and confirmed with the auctioneers that indeed the auction would proceed as scheduled. She was shown the suit premises by the auctioneer. On the day of the auction, she came and joined other people who had come for the same purpose. The auctioneer came at 11.40 and bidding started. About 3 people made their bids but in the end she emerged tops at Kshs. 420,000/= for one property and Kshs. 100,000/= for the other. After being declared the highest bidder, she immediately paid the requisite 25% of the bid and was given a certificate of sale. She was required to pay the balance of the purchase price within 30 days. She made the payments in 2 instalments of Kshs. 275,000/= and 115,000/= on 16th May, 1994 and 20th may, 1994 respectively. Upon full payment, the 1st defendant applied to the land control board for the consent to transfer. The plaintiff objected claiming that the sale was improper. However, the consent was later granted which together with a transfer she presented to the lands office and she was registered as the proprietor of the two suit premises and issued with title deeds on or about 11th September, 1995. She denied having conspired with anyone to buy the suit premises nor did she buy them secretly. She maintained that she bought them at a public auction and made all payments within the period prescribed. She had however not taken possession because the plaintiff had refused to vacate. She had sued him in a separate suit being **HCCC. NO. 495** seeking an order of eviction.

Arising from this evidence, the learned judge felt that the same question of law was involved in the 2 suits, viz, this suit as well as **HCCC.NO. 495 of 1995**. For that reason he ordered the consolidation of the 2 suits. In conclusion, the 2nd defendant prayed that this suit be dismissed with costs and that her prayers in the suit aforesaid be allowed with costs.

Cross-examined by **Mr. Onyancha**, learned counsel for the plaintiff, she stated that she went to see the auctioneers 2 to 3 days before the auction. The auctioneer did not indicate to her what the suit premises would fetch. She could not tell whether or not the plaintiff was present at the auction as she did not know him at the time. There were 3 bidders. One dropped out Kshs. 350,000/= and the other at Kshs. 400,000/=. That was with regard to the 1st suit premises. Regarding the 2nd suit premises, she was the only bidder. Thereafter she paid the required deposit and signed the agreement. There was evidence though that people resided on the suit premises. She saw 2 permanent houses, thereon but she was told that the permanent houses were part of the suit premises.

When the case next came up for hearing, **Mbaluto J** was no longer insitu. It was taken over by **I.C.C. Wambilyanga J** (as he then was) who directed that the proceedings be typed. This was done and on 13th June, 2001 by the consent of the parties involved it was ordered that the judge continues to hear the suit from where **Mbaluto J** had left.

This time around it was the plaintiff's brother to testify. The witness was none other than, **Samson Nyambati** (PW2). He testified that on 22nd April, 1994 he was at Kisii Post office where an auction was scheduled to take place. He arrived at 9.00 a.m and left at 4 p.m by which time no public auction in respect of his brother's suit premises had taken place. He had intended to bid for one parcel that had not been developed. He denied that the plaintiff was at the post office on the date that the auction was scheduled to take place. Later he learnt that the suit premises had been sold to the 2nd defendant. The suit premises were their family land and that is why he had wanted to buy it.

Cross-examined, he stated that the plaintiff was aware of the auction as he had told him about it. He was aware that the auction was to take place between 10.a.m and 11.a.m on 22nd April, 1994. However, he did not have a copy of the advertisement bill relating to that auction. He did not know the auctioneer as well.

The last witness called by the plaintiff was **Kennedy Benson Otundo**, a land valuer with **Messers Githaiga & Co**, Valuation Surveyors, Land, Estate and Managing Agents. He testified that he carried out a valuation of **Nyaribari Chache B/B/Boburia/3783** and valued it at Kshs. 723,340/=. He also valued **Nyaribari Chache /B/B/3830** at Kshs. 489,240/=. Cross-examined, he denied that he had manipulated the figures that he put in the reports. That then marked the close of the plaintiff's case.

The 3rd defendant testified next through **Alfred Sagwe Mudeizi**. He is the auctioneer. He received instructions to sale the suit premises by Public Auction in 1994 from the 1st defendant. He caused an advertisement in respect thereof to appear in the Daily Nation and Taifa Newspapers on 21st march, 1994. He also notified the plaintiff of the intended sale by a letter dated 17th March, 1994. The plaintiff did not respond. The sale eventually took off at Kisii post office at 11.00 a.m in the presence of the representative of the 1st defendant, **Mr. Omari**. He did not see the plaintiff. He sold each parcel separately. The highest bidder on each was the plaintiff at Kshs. 420,000/= and 100,000/= respectively. The plaintiff then paid 25% deposit being Kshs. 130,000/=. He then caused her to sign a sale agreement. He thereafter issued her with a certificate of sale. As far as he was concerned there was a public auction outside the Kisii post office which he conducted personally in respect of the suit premises. He denied having sold the suit premises through private treaty. He did not know the 2nd defendant then nor the plaintiff.

Cross-examined, he stated that he conducted the auction at Kisii post office and there were many bidders. The 2nd defendant was the highest bidder with regard to the suit premises. He was done with the auction at 11.30 a.m. He denied that he had not given time for the bidders to assemble. He had inspected the suit premises and saw 2 houses and one person in the compound. The plaintiff paid the 25% in cash. She thereafter executed the sale agreement and he later issued her with a certificate on 24th April, 1994. She subsequently paid the balance of the purchase price. He had been given a reserve price of Kshs. 461,000/=. He sold the suit premises beyond the reserve price.

Thereafter and for almost 7 years this case did not see the light of day until 13th July, 2010 when it came before me. By then, the 1st defendant had closed its case without calling any witness in its defence thereof. Thereafter parties agreed that since the previous proceedings had been typed and were available, I should proceed with the case from where **Wambilyanga J.** had left. They also agreed to file and exchange written submissions. This was subsequently done which I have carefully read and considered alongside cited authorities.

Having considered the pleadings, the evidence led in support thereof, rival written submissions, I am satisfied that the issues which call for determination in this suit are:-

- **Whether or not there was a legal and proper public auction on 22nd April, 1994.**

- **If the answer to the above is in the negative, whether the plaintiff is entitled to the prayers in the plaint.**

- **Costs and interest.**

With regard to the 1st issue, it is common ground that the plaintiff took various loans from the 1st defendant and secured the same through the suit premises. It is also common ground that the plaintiff defaulted in the repayments and pursuant to the statutory power of sale vested in the 1st defendant the plaintiff was duly served with the requisite Statutory Notice and Notification of Sale by the 3rd defendant. Indeed the plaintiff in his testimony conceded that he was made aware of the intended sale of the suit premises due to be conducted outside Kisii Postal Office. It is also common ground that the suit premises were somehow sold to the 2nd defendant as the highest bidder according to her own evidence as well as that of the auctioneer, DW2 though. Though the plaintiff and his witness think otherwise. Indeed she purchased the same at a total cost of Kshs. 520,000/=. It is also common ground that since the purchase aforesaid, the 2nd defendant has not been put into possession of the suit premises.

The main point of departure between the plaintiff and 1st defendant is as to how the alleged sale if at all was conducted. It is the case of the plaintiff that there was no public auction at all on 22nd April, 1994. In support of this proposition, he relied on the evidence of his brother, PW2 who claims to have attended the alleged auction on the material day between 9.00 a.m. and 4.00p.m. and none had taken place by the time he left for home. During all these time he never witnessed any auction as claimed by the defendants. The plaintiff, admitted in his evidence though that he did not attend the public auction personally as he was on the material day away in Nakuru on treatment for asthma. He also relies on the fact that the 2nd defendant paid the balance of the purchase price long after the expiry of 30 days permitted as evidence of the public auction having not taken place and or that if did it was by private treaty. In any event, it was subsequently violated by non-payment of the balance of the purchase price in

time. In deed the plaintiff's submission is that the 2nd defendant did not make any payments on the day of the alleged public auction as it is very clear that the 1st payment being Kshs. 25% of the purchase price was paid into his loan account on or about 7th June, 1994 almost 2 months later from the date of the alleged auction. The balance thereof was however deposited into his account on 10th December, 1994 almost 6 months from the date of the alleged auction. Finally, it was the contention of the plaintiff that if such a sale took place, then it was pre-arranged and therefore DW2 did not give time for other bidders to participate in the bidding. Hence the purported sale was irregular and infact illegal.

On the other hand the case for the defendants was that there was a public auction that was properly and legally conducted. The allegations made by the plaintiff with regard to the propriety of the sale were all false since due process was followed when the suit premises were sold to the 2nd defendant at the said public auction.

Between these two versions, which one is more credible and believable" I think that taking everything into account, the story of the defendants is more credible. First and foremost the plaintiff did not attend the auction. He conceded that much and stated that on the said date he was away in Nakuru on treatment for asthma. He instead dispatched his brother (PW2) to witness the public auction and bid for one of the properties. Much as PW2 claimed to have attended the alleged auction, it is possible that he may after all have not. He is afterall a brother to the plaintiff with a vested interest in the outcome of this case. His evidence may simply have been conjured up or manufactured merely to assist his brother. In any event, there was no documentary evidence tendered by the plaintiff with regard to his sojourn to Nakuru to seek treatment for his asthma ailment. According to the Notice of the public auction in the Daily Nation of 21st March, 1994, it was categorically stated therein that the auction would be on 22nd April, 1994 outside Kisii Office at 11.30 a.m. Yet PW2 claimed to have arrived at the vicinity 9.00 a.m. and stayed put until 4.00p.m. when he left. This story is unbelievable and in self-serving in my view. One wonders why he chose to leave at 4.00p.m. and not much later if he was keen to assist his brother to ensure that the auction did not take place behind their backs. Did it not occur to him that the sale could as well have proceeded later than 4.00 p.m. Afterall the advertisement did not indicate the cut off time. If he had testified that he waited until 6.00p.m, may be his story would have been believable. Further he testified that he was interested in buying the parcel of land that was undeveloped. Yet the plaintiff testified that he never got a loan on the strength of this suit premises. Is it logical" Indeed even under cross-examination he was not sure when the auction was supposed to take place. According to him it was to take place between 10.00 and 11.00 a.m. However, that cannot possibly be correct as the advertisement was clear and categorically that the same was to take place at 11.30a.m. This contradiction fortifies my earlier view that witness was merely manufacturing the evidence to aid his brother. He did not even have a copy of the advertisement bill relating to the auction. He conceded though that he was generally a busyman but on this occasion his matatu had been grounded. What a coincidence!

The evidence on record suggests that following the auction, the 1st defendant applied to the land control board for the consent to transfer the suit premises to the 2nd defendant. Apparently, the plaintiff objected twice to the consent being issued. Eventually it was however issued. The court would have been interested to see the plaintiff's grounds of objection to the consent to the transaction being granted and its relevance to this suit. Those are matters which were entirely within the knowledge and reach of the

plaintiff. That he failed to tender such evidence must be held against him. It is trite law that he who alleges must prove. It is him who alleges impropriety on the part of the defendants in the transaction. It was upto him to bring on board all the relevant evidence to back up his claims. That the land control board subsequently ignored his protestations and proceeded to grant the 1st defendant consent to the transaction, must have been satisfied that the allegations by the plaintiff regarding the impropriety of the public auction were baseless. I have no doubt at all in my mind that such evidence was relevant to this suit.

The evidence as to how the public auction was conducted was given by 2nd and 3rd defendants. They were all categorical that indeed the public auction took place. They were put under intense cross-examination on the issue and they remained unshaken. I cannot fathom how the 3rd defendant would go out of his way to advertise the sale of the suit premises in the daily papers and even write to the plaintiff in these terms **“.... We have caused publication of the intended sale to appear on 21st March, 1994 in the Daily Nation and Taifa Leo. Sale has been scheduled for 22nd April, 1994 at 11.30a.m. outside Kisii Post Office. We distributed posters in Kisii town and nearby market centres to attract more bidders. You are therefore advised (sic) to make arrangements with the counsels for the chargees before sale date. Should you fail to arrive at the (sic) settlement, you are advised (sic) and asked to come and witness the bids (sic). You may bring along with you bidders of your choice who might bid (sic) high for your benefit. Otherwise sale shall proceed as scheduled. We hope you will do all (sic) possible to save your land from sale and then fail to conduct the auction or conduct it surreptitiously.....”**. The plaintiff acknowledged receipt of this letter. How then could the 3rd defendant have turned round and sold the suit premises privately, secretly and or in a pre-arranged manner" as claimed by him. The 3rd defendant knew he was bound to be found out and or exposed if he undertook such a devious scheme of selling the suit premises in another way than by public auction. On the basis of the foregoing I doubt that the public auction did not proceed as claimed by the plaintiff.

DW2 testified that her interest in the suit premises were aroused when she came across an advertisement in the newspapers. She went and saw the auctioneers for further details and to confirm that the auction would indeed take place. On the due date she participated in the bidding. The contest was between her and 2 other bidders. The bids for those 2 collapsed in the process and she was left as the highest bidder. She paid the deposit of the purchase price on the fall of the hammer and signed the agreement for the sale. It is instructive that both sale agreements are dated 22nd April, 1994. It is also instructive that the receipt for the deposit was issued to her on the same day and certificate of sale 2 days later. The evidence of 2nd defendant is such that the public auction must have taken place. It is not the kind of evidence that one can pass as having been manufactured and or self-servicing. It is so detailed that it must be true.

It is also apparent that the balance of the purchase price was subsequently paid in 2 instalments of Kshs. 275,000/= and 115,000/= on 16th and 20th May, 1994 respectively which was within time stipulated. It may be true that the amount was not immediately deposited and reflected in the plaintiff's loan account. However it was not the duty of the 2nd or 3rd defendants to ensure that the amount is immediately deposited in the plaintiff's account. Further, no evidence was led by the plaintiff to the effect that it was a mandatory requirement that so soon after the fall of the hammer and payment of the full purchase price, thereof the same should immediately be banked in his loan account. The 3rd defendant in any case conducted the auction on behalf of the 1st defendant and as its agent and money received by

the 3rd defendant as aforesaid is deemed to have been received the 1st defendant whether or not it was subsequently banked in the plaintiff's account.

The 3rd defendant through **Alfred Sagwa Mudeizi** testified as to how he conducted the auction. The suit premises were sold to the 2nd defendant by way of public auction and not by private treaty or in a pre-arranged manner as suggested by the plaintiff. All the exhibits adduced before court allude to and confirm sale by public auction and not otherwise. In the premises I do not think that there was opportunity or motive for the defendants to collude and or commit any irregularities to the detriment of the plaintiff. The allegations by the plaintiff that no auction took place in the light of all the foregoing are a mere afterthoughts and a creation of his imagination. Taking into account all that I have said in the preceding pages, the answer to the first two issues framed must be pretty obvious; that there was a proper and legitimate public auction of the suit premises on 22nd April, 1994 and that being the case, the plaintiff is not entitled to any of the prayers in the plaint.

The 2nd defendant has submitted that sometimes in the month of March, 2006 PW2 died and he was to be buried on 31st March, 2006 in one of the suit premises. She filed a suit HCCC No. 245 of 2006 and obtained injunctive orders restraining the plaintiff from burying the remains on the suit premises. At the hearing of the application it transpired that indeed the suit premises which she had been shown actually belonged to and was registered in the names of the deceased. Subsequently the injunctive orders were set aside and the burial went on. However the plaintiff was ordered to identify exactly where the suit premises the subject of the auction were situate but to date that has never been done.

On the basis of the foregoing facts, the 2nd defendant has asked this court to invoke its original jurisdiction, and as a court of equity and since equity demands that he who comes to it must come with clean hands, and order that the 1st defendant refunds her Kshs. 520,000/= being the purchase price it received together with interest from 2nd

April, 1994 to date. In support of these submissions counsel for the 2nd defendant has relied on the following authorities:-

- **Agricultural finance Corporation –vs- Kenya National Assurance Company Limited C.A No. 271 of 1996 (UR).**

- **Tanzania Tea packers Ltd –vs- Commissioner of Income Tax (2000) 1 E.A 233.**

- **Peter Waweru Waititu –vs- Cyrus J. Karanja C.A No. 257 of 2001 (UR).**

First and foremost, I do not think that these authorities are of any assistance to the 2nd defendant. The facts in this case are clearly distinguishable from the facts in those authorities. Secondly, no evidence was led with regard to that issue. Neither was the issue pleaded. Further there was no counterclaim in that regard. As stated by **Mwera J.** in the case of **Meshack Allan Olang –vs- Eric Gowi, HCCC No. 2371 of 1990** “...*It is trite law that whatever is put in evidence should support what has been pleaded, an award or indeed a relief will issue when what has been pleaded is proved. To get his relief a plaintiff must prove what is pleaded*”. Put differently in my view, a party can only get what he has pleaded and proved at the trial. Unless the matter is pleaded and admissible evidence led in prove thereof a party will not of necessity be entitled to a judgment whether the suit is contested or not. In this case the 2nd defendant neither pleaded the fact that since the purchase aforesaid, she had been denied possession thereof nor did she lead evidence in that respect as against the 1st defendant. She never asked for a refund of the purchase in her defence. Indeed she never initiated proceedings against the 1st defendant along the said lines. It follows therefore that the remedy she has belatedly sought from the 1st defendant is not available to her.

Finally, I note that the 1st defendant never testified. However, I do not think that its evidence was absolutely necessary as it would appear that the plaintiff’s main complaint was in the manner the auction and sale if at all was conducted of this suit premises. The 2nd and 3rd defendants were the participants in the exercise. Their evidence therefore sufficed.

All in all, the plaintiff has failed to prove his case on the balance of probability against all the defendants. Hence the suit is for dismissal with costs to the defendants. It is so ordered.

Judgment dated, signed and delivered at Kisii this 30th day of September, 2010.

ASIKE-MAKHANDIA

JUDGE



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