



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 118 OF 2017

JOYCE WAIRIMU KARANJA.....APPELLANT

VERSUS

JAMES MBURU NGURE.....1ST RESPONDENT

U & I MICRO FINANCE BANK.....2ND RESPONDENT

STANLEY T. MUGACHA

T/A GALAXY AUCTIONEERS.....3RD RESPONDENT

KIAMBU LAND REGISTRAR.....4TH RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kiambu (Hon. J. Kituku) Delivered on 2/08/2017 in Kiambu CM Civil Case No. 130 of 2016).

JUDGMENT

1. The 1st Respondent herein (**James Mburu Ngure**) took out a loan from the 2nd Respondent (**U & I Micro Finance Bank**) sometime in December, 2015. The loan amount was Kshs. 1.2. It was secured by charging Land Parcel No. Kiambaa/Kanunga/2741 ("Suit Property") to the 2nd Respondent.
2. Both the 1st and 2nd Respondents agree that at some point the 1st Respondent fell in arrears in servicing the loan. After making due demand and failing to get the appropriate response, the 2nd Respondent served the requisite 45 days Redemption Notice on the 1st Respondent on 03/02/2016. The amount due, according to the Redemption Notice, was Kshs. 1,724,000/-.
3. The 1st Respondent was also served with a due Notification of Sale warning him that an auction of the charged property will take place on 13/04/2016 at Pangani Auction Centre. The auction was duly advertised in the *Daily Nation* of 24/03/2016. It was to be conducted by the 3rd Respondent (**Stanley T. Mugacha T/A Galaxy Auctioneers**).
4. On 11/04/2016, two days before the planned auction, the 1st Respondent filed the suit in the Kiambu Chief Magistrate's Court praying for a permanent injunction restraining the 2nd and 3rd Respondents from selling the Suit Property. Remarkably, the suit also sought for orders directing that the 1st Respondents continues servicing the loan by paying Kshs. 48,000/- until it was cleared.
5. Simultaneously with the Plaintiff, the 1st Respondent filed a Notice of Motion seeking for temporary relief stopping the planned auction. In the first instance, the 1st Respondent approached the Court *ex parte*. He got orders of interim injunction until the hearing of the Application *inter partes*. The *inter partes* hearing was scheduled for 20/04/2016.
6. On 20/04/2016, the 1st Respondent did not turn up for hearing. The Notice of Motion dated 11/04/2016 was dismissed for non-attendance.
7. The next day, 21/04/2016, the 1st Respondent was back in Court under Certificate of Urgency. This time, his Notice of Motion prayed for orders that the Court sets aside or vary the orders made the previous day dismissing the 1st Respondent's Notice of Motion dated 11/04/2016. It also prayed for orders that the interim relief originally granted on 11/04/2016 be extended. That Notice of Motion was scheduled for 27/04/2016. It was duly heard and a ruling reserved for 25/06/2016.
8. In a ruling delivered on 25/06/2016, the Learned J. Kituku allowed both prayers in the Notice of Motion dated 21/04/2016. Consequently,

the Application dated 11/04/2016 was reinstated and the *ex parte* orders originally issued on 11/04/2016 was reinstated as well.

9. The Application dated 11/04/2016 was eventually heard on 29/06/2016. The Ruling was reserved and was eventually given on 31/08/2016. The Application was dismissed in its entirety.

10. Meanwhile, after the interim orders were automatically lifted with the dismissal of the Application on 20/04/2016, the 2nd and 3rd Respondents proceeded to re-advertise the Suit Property for auction on 09/05/2016. The re-advertisements appeared in at least two National Dailies (*The East African Standard* and the *Daily Nation*) on 22/04/2016. The auction proceeded on 09/05/2016. The Appellant (**Joyce Wairimu Karanja**) attended the auction and was winning bidder at the auction. She paid the requisite 25% deposit of her winning bid of Kshs. 2,300,000/-. She was given a Certificate of Sale. The Completion date was slated for a month later. However, by this time, the 1st Respondent had filed his Application to reinstate the Application and had obtained interim orders – so the Appellant held off completing the sale as she awaited the ruling of the Court on the Application dated 11/04/2016.

11. As aforesaid, the Application dated 11/04/2016 was eventually dismissed on 31/08/2016 paving the way for the Appellant to complete the sale. Consequently, on 15/09/2016, she paid, by banker's cheques, the remaining sums to complete the sale. Upon this payment, the 1st Respondent arranged to have the title transferred to the Appellant. The Appellant was issued with the title deed on 31/10/2016.

12. Unfortunately, this did not bring the story to a close. On 21/09/2016, the 1st Respondent had launched another salvo in Court. This time, it was an Application asking for prayers that the Court appoints an independent valuer to assess the value of the Suit Property. It also sought for orders restraining the Kiambu Lands Registrar from registering any transfer against the Suit Property. This Application was eventually allowed on 30/11/2016. It is important to recall that by that time, the Appellant had already been registered as the owner of the Suit Property – a new title to her having been issued on 31/10/2016.

13. Upon learning of the orders issued on 30/11/2016, the Appellant brought an Application seeking to be enjoined as a party to the suit. Similarly, upon learning of the transfer that had taken place on 31/10/2016, the 1st Respondent did two things: First, he registered a restriction against the Suit Property. Second, he launched a new Application dated 22/12/2016. The Application dated 22/12/2016 principally sought the following four prayers:

1. That the 1st Respondent be granted leave to amend his Complaint dated 11/04/2016 as per the Draft Amended Complaint annexed to the Application and included the Appellant and Kiambu Land Registrar as parties to the suit;
2. That the amended Complaint annexed to the Application be treated as the 1st Respondent's Complaint and that same be deemed as having been duly filed;
3. That the sale of the Suit Property by the 2nd and 3rd Respondents be cancelled and declared null and void as the same was sold through illegal and fraudulent means.
4. That the District Land Registrar, Kiambu be ordered to reflect the change of ownership and issue a title deed in the name of the 1st Respondent.

14. Not to be outdone, the Appellant launched her own Application dated 14/02/2017. It sought two principal prayers as follows:

1. That the Court be pleased to discharge, vary and/or set aside the orders issued by Hon. J. Kituku given on 30/11/2016 and issued on 01/12/2016;
2. That the restriction registered against the Appellant's title of the Suit Property on 21/11/2016 or any other date either in anticipation or after the Court's issued on 01/12/2016 be removed.

15. The first two prayers in the 1st Respondent's Application dated 22/12/2016 were granted by consent. The Court then directed that the two Applications be heard simultaneously.

16. The 1st Respondent's Application was principally based on two related arguments. First, that the sale to the Appellant was illegal and fraudulent. This is because, the 1st Respondent says, no independent valuation was done before the auction was conducted on 09/05/2016. The argument is that this was a foul section 97 of the Land Act.

17. Secondly, the 1st Respondent's Application was based on the argument that the Suit Property was sold at an excessively undervalued amount. To bolster his argument in this regard, the 1st Respondent relied on the Valuer's Report filed in Court pursuant to the orders of 30/11/2016. That Report valued the Suit Property at Kshs. 3,500,000/-. The Report was done by Mr. A.N. Kiriko of Highlands Valuers Ltd and is dated 31/03/2017.

18. The Appellant resisted the 1st Respondent's Application. Her argument has been that there was nothing illegal in the sale and transfer of the Suit Property to her. She also relied on an affidavit by the Credit Manager of the 2nd Respondent which exhibited evidence that, indeed, the 2nd Respondent had asked for an independent valuation of the Suit Property sometime in January, 2016 before subjecting it to the sale. Hence, she urged that there was demonstrated adherence to section 97 of the Land Act. The valuation was done by S.M. Muiruri of Topmark Valuers Ltd. The report is dated 26/01/2016. It valued the property at Kshs. 3,000,000/- with a forced sale value of Kshs. 2,300,000/-.

19. The Appellant argued before the Learned Trial Magistrate that having bought the Suit Premises at an auction which was legal and regular, the 1st Respondent's equity of redemption was extinguished. It was, therefore, not open for the Court to issue the orders of 30/11/2016. It was, similarly, not regular for the 1st Respondent to register a restriction against the Suit Property.

20. After considering the rival arguments, the Learned J. Kituku issued his ruling on 26/07/2017. He decided the two Applications on two points. First, he came to the conclusion that under section 97(3), a sale can only be declared void if the sale price is below 25% of the market price. The Court made a finding that the sale in this case was not below 25% of the market price. The Court therefore concluded that this was, therefore, not a valid ground for seeing aside the sale.

21. Then, the Learned Magistrate turned to the question of regularity of the sale. In material part, he states as follows:

It is noteworthy that the initial sale was slated for 13/04/2016 but did not proceed as this Court had issued stop order (sic) that means the process of redemption was hindered (sic). Once the order lapse[d], fresh notice of notification of sale should have issued and not mere advertisement.

*As held in **Maina Wanjigi & Another v Bank of Africa Kenya Ltd & 2 Others [2015] eKLR** that procedural impropriety variation viliifies (sic) the sale conducted on 9th March, 2016 and no good title could pass for the 3rd Defendant [Appellant].*

22. I note from the context that the Learned Magistrate must have been referring to the sale that took place on 09/05/2016 and that the reference to 09/03/2016 was a typographical mistake.

23. So, the Learned Magistrate determined the two Application on the point that the auction that took place on 09/05/2016 was irregular because, in the Court's view, after the Court had issued interim orders stopping the sale on 11/04/2016, the 2nd Respondent had to issue a new Notice of Notification of Sale before auctioning the Suit Property. The Learned Magistrate ostensibly relied on the **Maina Wanjigi Case**. On this score, the Learned Magistrate proceeded to nullify the transfer to the Appellant and directed the Land Registrar to cancel the change of ownership. Conversely, the Learned Magistrate dismissed the Appellant's Application dated 14/02/2017.

24. It is this ruling that has prompted the present appeal. The Appellant has listed down five grounds of Appeal. They are as follows:

I. The Learned Magistrate erred in law and fact in allowing the Plaintiff/Respondent application dated 22nd December, 2016 and dismissing the 3rd Defendant/Appellant application dated 14th February, 2017 while overwhelming evidence was tendered in support of the application dated 14th February, 2017 as opposed to the application dated 22nd December, 2016.

II. The Learned Magistrate erred in fact and in law in applying and/or by disregarding the Principles of Equity of redemption, Effects of any irregularities in an auction (if at all) and the Principles of discharging irregularly obtained Orders in arriving at his decision.

III. The Learned Magistrate erred in fact and in law in failing to recognize that when the 3rd defendant bought and had the suit property transferred to herself not only had the Plaintiff's Equity of redemption been extinguished but there were no Orders barring the same.

IV. The Learned Magistrate erred in fact and in law in disregarding that the 3rd defendant/appellant had acquired a clean title being an innocent purchaser for value.

V. The Learned Magistrate erred in fact and law in the first instance condemning the 3rd Defendant/Appellant unheard and in subsequently re-affirming his decision despite not having heard the 3rd Defendant.

25. To my mind, there is a singular issue raised on appeal: it is whether the Learned Trial Magistrate was correct to come to the conclusion that the auction and transfer to the Appellant was irregular and unlawful because the 2nd Respondent did not issue another Notification of Sale after the interim orders were issued on 11/04/2016 even though they were lifted on 20/04/2016.

26. In her submissions, the Appellant has cited a legion of cases to demonstrate that this was a misdirection by the Learned Trial Magistrate. In my view, the Appellant is correct. I say so for three primary reasons.

27. First, the Learned Magistrate states that after a Court has stopped an auction even if temporarily, a mortgagee must start the process of exercising the statutory power of sale afresh: by issuing a new notice. The Learned Magistrate ostensibly drew this principle from the **Maina Wanjigi Case**. In fact, the **Maina Wanjigi Case** said no such thing. To the contrary, in that case, Justice Ogola ordered that the mortgagee re-advertise after coming to the conclusion that the auction conducted was irregular. There is no basis in law, equity or practice for the Learned Magistrate to conclude that a mortgagee who is exercising a statutory power of sale which is ephemerally stopped by the Court must issue a new Notification of Sale to the mortgagor before conducting a sale once the order stopping the sale is lifted.

28. Second, it is important to highlight the fact that there was no order stopping the sale when the 3rd Respondent re-advertised the sale on 22/04/2016. Similarly, there was no subsisting order when the sale actually happened on 09/05/2016. The Appellant saw the advertisement in the National Dailies. She attended the auction on 09/05/2016 and placed the winning bid of Kshs. 2,300,000/-. She then completed a Certificate of Sale and duly paid the requisite 25% deposit. Later on, after a second interim order was lifted, she paid the remaining purchase price.

29. Third, both statutory and decisional law have clearly stated that the remedy for a mortgagee who has suffered damages as a result of

improper auction, is not to reverse the auction against an innocent purchaser – but in damages. Indeed, the statute immunizes a purchaser at a sale conducted by a mortgagee in the exercise of the statutory power of sale in the following words in section 99 of the Land Act:

(1) This section applies to—

(a) A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) Is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) Is not obliged to see to the application of the purchase price;

(c) Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the charger, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, 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.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

30. This section seems quite clear that a purchaser of property sold in the exercise of a chargee's statutory power of sale is protected even in cases where the person had actual notice that the charge had not properly realized that statutory power of sale in terms of procedure. In this case, there is no evidence to show that the Appellant had any notice of any irregularities in the planned sale – and evidence suggests that there were none anyway. The point is that the Appellant is then inoculated by section 99 from any action to recover the Suit Property from her.

31. Our case law has been consistent in holding this position. The Appellant cited many cases whose holdings I need not rehash here. Some of the cases the Appellant relied on included: **Simon Njoroge Mburu v Consolidated bank of Kenya Ltd (2014) eKLR**, **Nancy Kahoya Amadiva vs Expert Credit Ltd & another (2015) eKLR** and **Lawrence Mukiri vs Attorney General & 4 others (2013) Eklr**; **Twin Buffalo Safaris Ltd. v Business Partners International Ltd (2015) eKLR**. Suffice it to cite two cases. Justice J.B. Havelock had this to say about section 99 and the position of a purchaser in **Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] eKLR**:

That section [99] now statutorily encompasses the right of the charger prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the Plaintiff's remedy lies in this case. In this regard, the Plaintiff would do well to note the powers of the Court in respect of remedies and reliefs set out in under section 104 of the Land Act, 2012...

What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages...

32. In similar vein, the Court of Appeal had this to say in **Nancy Kahoya Amadiva v Expert Credit Limited & Another**:

*The 2nd respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser" In **Captain Patrick Kanyagia and Another v Damaris Wangeci and others**, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in **David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR**. In **Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported)**, this court held that a purchaser at a public auction was protected by **section 69(B)** of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the appellant has not demonstrated that the 2nd respondent had any notice of irregular exercise of the statutory power of sale by the 1st respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 2nd respondent before the trial court, the 2nd respondent's action to purchase was based on the advertisement for sale advertised in the newspaper. The 2nd respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security.*

33. In my view, there is little reason to belabour the point. Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise of the statutory power of sale is immunized from suit under section 99 of the Land Act. Thirdly, a mortgagor's equity of redemption is extinguished upon the fall of the hammer in a public auction. Fourthly, there is no requirement in law or equity that a mortgagor re-issues the statutory notice if a planned auction is temporarily stopped by the Court and then permitted to proceed through the lifting of the temporary orders.

34. Given these conclusions, it follows that there was no proper basis for holding that the auction done on 09/05/2016 was unlawful or irregular. Consequently, there was no reason to nullify it, and no reason to make an order that the title to the Suit Property to revert to the 1st Respondent.

35. Conversely, given these findings, it follows that the orders granted by the Learned Magistrate on 30/11/2016 should not stand. There are two reasons why those orders were problematic. The first one is that there was no basis for ordering an independent valuation at that point in the process. Indeed, given the Learned Magistrate's reasoning about the effect of section 97 of the Land Act, the logical position would have been to set aside those orders. Second, the effect of the second order of 30/11/2016 was, in fact, to grant the 1st Respondent an injunction through the back door yet his substantive application for injunction had been dismissed as groundless on 31/08/2016. The effect of the orders of 30/11/2016 was to functionally reinstate the injunctive orders which were lifted on 31/08/2016 because the Court had concluded that there was no proper basis for injunctive relief.

36. The upshot is that the Appeal herein is allowed. The Court sets aside the ruling allowing the 1st Respondent's Application dated 22/12/16 and dismissing the Appellant's Application dated 14/02/2017. In its place, the Court enters an order allowing the Appellant's Application dated 14/02/2017 and dismissing the 1st Respondent's Application dated 22/12/2016. The costs of this Appeal and costs at the subordinate Court are awarded to the Appellant.

37. Orders accordingly.

Delivered at Kiambu this 15th Day of March, 2018.

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JOEL NGUGI

JUDGE