Karanja v Molyn Credit Limited & another (Civil Appeal E071 of 2020)
[2024] KEHC 10178 (KLR) (Commercial and Tax) (16 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10178 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E071 OF 2020

A MABEYA, J

AUGUST 16, 2024

BETWEEN

FLORENCE NJERI KARANJA ..... APPELLANT

AND

MOLYN CREDIT LIMITED ..... 1ST RESPONDENT

PETER NGOTHO ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon G. A MMASI Senior Principal Magistrate at the Milimani Commercial Courts delivered on 6th November, 2020 in CMCC 109 OF 2018)

JUDGMENT

1. This is an appeal arising from the Judgment of Hon. G.A MMASI delivered on 6/11/2020. Being aggrieved by the decision of the trial court, the appellant lodged an appeal to this Court vide a Memorandum of Appeal dated 24/11/2020. The grounds upon which the appeal is premised on can be summarized as follows: -

    a. That the court erred in dismissing the plaintiffs suit and allowing the respondents counterclaim;

    b. That the court erred in finding that the statutory power of sale had accrued and failed to appreciate the mandatory provisions of section 96(2) of the *Land Act*; and

    c. That the court derogated the appellant's equity of redemption despite her paying the loan in full.

2. This being a first appeal, the Court is guided by the principles set out in *Selle v Associated Motor Boat Co.* [1968] EA 123 wherein it was held that: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

3. The case in the court below was that the appellant applied for a loan facility with the 1st defendant of Kshs 600,000/- payable within 48 months together with interest at 5% per month. The facility was secured by a property known as Githunguri.nyagA/T.427 ("the suit property"). The loan was advanced to her son and she only provided the security.

4. There was default and the 1st respondent proceeded to exercise its statutory power of sale. The plaintiff moved to court seeking a permanent injunction to restrain the 1st respondent from selling the suit property, damages for invading the suit property and a declaration that the auction was illegal. The 2nd defendant filed a counterclaim to evict the appellant from the suit property. The trial court dismissed the plaintiff's suit and allowed the counterclaim.

5. The appeal was canvassed by way of written submissions which I have considered. The appellant submitted that, in its ruling dated 4/12/2014, the High Court had held that the statutory notices were not in compliance with section 90 of the *Land Act*. That however, the trial court disregarded this in its judgment.

6. Further that, the trial court overstepped its mandate by failing to be bound by the decision of the High Court. That the statutory notices were not valid and therefore that, it could not be said to have been issued. In this regard, Counsel submitted that, the exercise of the statutory power of sale was unlawful. That the interest charged was unlawful and against the in duplum rule.

7. The 1st respondent submitted that the statutory power of sale had accrued and the appellant was issued and served with the requisite notices. That the chargor's equity of redemption was extinguished at the fall of the hammer and the appellant's remedy was only in damages.

8. I have carefully considered the record and the submissions of Learned Counsel. The bone of contention is the manner in which the suit property was sold. From the record, it is not in dispute that there was default in servicing the loan facility. The question before court is the issuance and service of the statutory notices, the legality of the auction and the interest on the loan amount.

9. On the service of the statutory notices, the appellant told the court that the High Court had in its ruling dated 4/12/2014, held that the process of exercising the statutory power of sale was not valid. That the trial court ought to have been bound by that decision.

10. From the record, there is a letter dated 4/6/2013. It was a statutory notice for sale addressed to the appellant's postal address. Section 90(2) of the *Land Act*, 2012 provides that the notice shall adequately advice the chargor of the following: -

> " a) The nature and extent of the default by the chargor;

b) If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three (3) months, by the end of which the payment in default must have been completed.

c) ...

d) The consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e) The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies."

11. In the present case, the statutory notice stipulated that the plaintiff had defaulted in the sum of Kshs 1,152,445/-. As found by Kamau J in her ruling of 4/12/2014 at the interlocutory stage, the statutory notice was not in accordance with section 90(2)(b) of the *Land Act*. According to that provision, the statutory notice is supposed to specify the default and require the rectification of that default.

12. That section is geared towards protecting the mortgagor's equity of redemption. In this case, the loan of about Kshs 537,000/- was disbursed on 14/2/2013. It was to be repaid within 48 months. On 4/6/2013, less than 3 months later, the purported statutory notice indicated the default as being Kshs 1,152,445/-. It never indicated what that amount constituted. It was imperative for the notice to specifically state the default. The default could not be the entire amount of the loan since the same was payable in 48 month's time. To that extent, the trial court erred since at the trial, this defect was never explained to displace the findings of Kamau J of 4/12/2014. That finding, although at the interlocutory stage, was binding as it was a finding on law.

13. The second issue is the provisions of section 96 of the *Land Act*. The same provides: -

" 1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a charge may exercise the power to sell the charged land.

2) "Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell".

14. The above means that, after the lapse of the initial 90 days under the statutory notice of sale, a charge is obligated to issue another 40days notice upon the chargor. This is independent of the redemption notice by the auctioneer under the *Auctioneer's Act*. Under Regulation 16 of the *Auctioneer's Regulations, 1997*, the Auctioneer is supposed to issue a 45day redemption notice and thereafter give 14days advertisement period.

15. In this regard, before the statutory power of sale can be properly be exercised, 3 notices totaling 175days must be given, 90 days, 40 days and 45 days before the property can be advertised for sale.

16. In the present case, as Kamau J found at the interlocutory, and I make the same finding, the 1st defendant did not give the 40days notice in accordance with section 96(2) of the *Land Act*. To that

extent, the trial court erred in failing to note that the statutory power of sale had not arisen. The 2nd defendant purchased nothing at the purported public auction.

17. The appellant also complained about the interest charged. That it was contrary to the in duplum rule. In justifying the interest charged, the 1st respondent testified that it was not bound by the in duplum rule or the *Banking Act* since it was not a bank.

18. I have perused the proceedings of the trial court. The 1st respondent testified that the loan accumulated interest and the total amount owing was Kshs 1,553,168/=. The witness testified that the appellant as at December, 2013 had paid Kshs 738,131. The court notes that the amount paid was more than the principal amount of Kshs 600,000/-.

19. The basis of the in duplum rule was expounded by the Court of Appeal in the case of *Kenya Hotels Limited v Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited)* (2019) eKLR, as follows:-

> " In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May 2007 it has been applied by the courts with reasonable degree of consistency. See *Lee G. Muthoga v Habib Zurich Finance (K) Limited & another* (2016) eKLR, *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* (2019) eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.
>
> 'The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides."

20. From the foregoing, the law does not permit the charging of interest more than the principal sum when the loan becomes non-performing. In this case, the principal sum was Kshs 600,000/-. The evidence at the trial was clear. It became non-performing from inception as the cheques issued in repayment thereof were dishonored. In this regard, the amount recoverable thereunder could not exceed double the principal amount of Kshs 600,000/-.

21. The 1st respondent claims that it is not a bank therefore not bound by in duplum rule. I have always believed that, that principle although codified under section 44A of the *Banking Act*, is of universal application to all those who are in the business of lending.

22. In *Mugure & 2 others v Higher Education Loans Board* (Petition E002 of 2021) [2022] KEHC 11951 (KLR) (Civ) (19 August 2022) (Judgment), it was held that: -

> " From the foregoing, the Court of Appeal was alive to the fact that the rule was concerned with public interest. In my view, the rule was introduced in our Laws to tame the appetite of Lenders who had made recovery of interest on advances a cash cow. Simply put, the Legislature was expressing its displeasure with lenders who left amounts of advances to go over the roof due to interest before pouncing on the hapless borrowers.

It was intended to protect borrowers from exorbitant interest accumulation on loans and limit the amount recoverable by a lender on a defaulted facility to no more than double the principal owing when the loan has become non-performing plus recovery expenses.

In this regard, I hold that being of public interest, the in duplum rule will be applicable for those lending monies as it does to banks" Emphasis supplied.

23. In view of the above, I hold that the in duplum rule is not only binding on banks under the *Banking Act*, but it is also binding upon all the money lending companies or institutions. It is a principle in public interest and/or public good. In this regard, the 1st respondent is equally bound by the same.

24. From the record, it would seem that the appellant further deposited Kshs 595,954/- with the 1st respondent's advocates after the interim injunction was given by Kamau J thus making the total payment to be Kshs 1,367,237/-. On this ground, I find that the trial court erred in holding that the 1st respondent was not bound by the in duplum rule.

25. In this regard, I find that the appeal is meritorious and I allow the same. I set aside the judgment of the trial court and allow the suit by the appellant in terms of prayers a), b) and c3 of the Amended plaint.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE