



REPUBLIC OF KENYA



KENYA LAW
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**K-Rep Bank Limited v Mathias (Civil Appeal 6 of 2019)
[2022] KEHC 17047 (KLR) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 17047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 6 OF 2019
MN MWANGI, J
MARCH 31, 2022**

BETWEEN

K-REP BANK LIMITED APPELLANT

AND

PRISCILLA KINA MATHIAS RESPONDENT

RULING

1. The suit against appellant in the lower court was through a plaint dated July 6, 2011. In the said plaint the respondent averred that the house situated on Mombasa/Changamwe/102 (hereinafter referred to as “the property”) was grossly undervalued and sold at a throwaway price and that the sale was irregular, illegal, oppressive, harsh and fraudulent. In the said case, the appellant filed its statement of defence dated September 27, 2011, where it denied the allegations by the respondent and stated that the property was properly valued and that the sale was regular, legal and not oppressive or fraudulent and put the respondent to strict proof thereof.
2. The trial court found that the respondent had proved her case against the appellant on a balance of probabilities and that the suit property had been unlawfully and irregularly sold after undervaluation. The appellant was ordered to pay or refund the respondent a sum of Kshs 1,000,000/= with interest at court rates from the date of Judgment.
3. The appellant being dissatisfied with the decision of the trial court on January 14, 2019 filed a memorandum of appeal raising the following grounds of appeal-
 - i. That the learned honourable magistrate erred in law and fact by failing to find that the respondent’s valuation report dated June 14, 2011 was conducted after the lapse of one year and one month after the completion of the auction;



- ii. That the learned honourable magistrate erred in law and fact by holding that the valuation report conducted by the appellant on April 20, 2010 was grossly undervalued yet it was prepared 4 days before the auction of April 24, 2010;
 - iii. That the learned honourable magistrate erred in law and fact by refusing to address and determine the validity of the valuation report relied on by the respondent because-
 - a. There was no practising certificate attached to the report whereas practicing certificates for individuals in the valuation profession are issued annually.
 - b. The person who prepared the report failed to provide proof that she was an expert as at the time of preparing the report to enable the court rely on it as a report by an expert.
 - iv. That the learned honourable magistrate erred in law and fact by failing to consider the submissions and authorities submitted by the appellant; and
 - v. That the learned honourable magistrate erred in law and fact by considering irrelevant factors thus erroneously arriving to the decision.
4. The appellant's prayer is for this court to allow the appeal and substitute it with its own judgment dismissing the respondent's claim in its entirety with costs.
 5. Through a notice of preliminary objection dated March 15, 2021, the respondent opposed the appellant's appeal on the following grounds:
 - i. That the appellant's appeal is incompetent, bad in law, incurable/fatally defective (sic) and an abuse of the court process;
 - ii. That the appellant's appeal does not comply with the mandatory provisions of section 79G of the *Civil Procedure Act*, cap 21; and
 - iii. That this honorable court cannot entertain defective proceedings and we pray the record of appeal dated August 31, 2020 be struck out with costs.
 6. The appeal herein was canvassed by way of written submissions. On January 22, 2021 and August 3, 2021, Munyao, Muthama & Kashindi Advocates filed written submissions on behalf of the appellant. On July 28, 2021, the respondent's submissions were filed by the law firm of Kadima & Company Advocates.
 7. On the preliminary objection, Mr Amadi, learned counsel for the respondent submitted that judgment in the case in the lower court was entered on December 5, 2018, while the memorandum of appeal was filed on January 14, 2019, which was outside the 30 days' statutory provision and no explanation was given for the delay. He cited the case of *Attorney-General & another v Onamu Apindi* [2012] eKLR, where the court dismissed an appeal for having been filed out of time, without leave.
 8. Ms Gitari, learned counsel for the appellant submitted that under order 50 rule 4 of the *Civil Procedure Rules*, the period between 21st December in any year and the 13th of January in the following year (both days inclusive) are excluded from computation. She stated that time did not run for the purposes of filling the memorandum of appeal hence the 30 days provided in the statute would have elapsed on January 29, 2019.
 9. In regard to the appeal, she submitted that the appellant's valuation of the property dated April 20, 2010 and conducted by Basemaek Valuers Limited who valued the property (house without land) at an open market value of Kshs 900,000/= and a forced sale value of Kshs 600,000/=, while the



respondent's valuation dated June 14, 2011, was carried out 1 year and 1 month after the sale of the property. That the said report gave the property an open market value of Kshs 2,800,000/= and a forced sale value of Kshs 2,000,000/=. Ms Gitari indicated that there was a possibility of improvements having been done by the new owner of the property.

10. She stated that the proper value of the property was discovered on April 24, 2010, when the property was sold in an auction at Kshs 700,000/=, which amount was higher than the forced sale value of Kshs 600,000/=. She cited the decision in *Stephen Kipkatam Kenduiywa t/a Kapchebet Farm v Sidian Bank Limited & another* [2017] eKLR, where the court held that there is no reason to stop an auction since the proper value will emerge when the property will be offered at the auction sale, as that is when it will be discovered exactly how the market views the property.
11. Mr Amadi submitted that since the appellant did not challenge the production and admission into evidence of the respondent's valuation report at the time of trial, it was estopped from challenging the court's reliance on the said report. Further, he submitted that from the evidence by Josephine Wanjiku Osoro (DW2) it can be discerned that the appellant's valuation report dated April 20, 2010 was a gross undervalue, since the property size did not add up to the actual size of the property as the respondent's property has 12 to 14 rooms and not 5 rooms as contained in the appellant's valuation report and that it attracted a monthly rent of Kshs 28,000/= and that the property was near an international airport.

Analysis And Determination.

12. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own independent decision while bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In *Abok James Odera T/A A J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

Whether the memorandum of appeal should be struck out for being filed out of time without leave.

13. The issues for determination are:
 - i. Whether the memorandum of appeal should be struck out for being filed out of time without leave of the court; and
 - ii. Whether the trial court erred in relying on a valuation report conducted by valuers instructed by the respondent.
14. The law governing filing of appeals from the subordinate court to the High Court is governed by section 79G of the *Civil Procedure Act* (the Act) which provides that-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:



Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

15. From the above provisions, it is clear that all appeals from the subordinate court to the High Court must be filed within 30 days from date of the decree or order appealed against. In this case the judgment was rendered on December 5, 2018 and the memorandum of appeal was filed on January 14, 2019. On the face of it, it shows that the memorandum of appeal was filed 39 days after delivery of the judgment, which would mean that the appeal was filed out of time.

16. It is however worth noting that the judgment was delivered on December 5, 2018, which is a material factor in this appeal. The provisions of order 50 rule 4 of the *Civil Procedure Rules* state as follows-

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act provided that this rule shall not apply to any application in respect of a temporary injunction.”

17. In this instance, while computing the 30 days requirement in filing of an appeal from the lower court to the High Court, the period between the twenty-first day of December, 2018 and the thirteenth day of January, 2019, both days included, were to be omitted from any computation of time. In total, twenty four (24) days should have been omitted in the computation of the days within which an appeal herein ought to have been filed to the High Court. Having omitted the 24 days out of the 39 days within which the memorandum of appeal herein was filed, I hold that the memorandum of appeal was filed within 15 days from the date of the judgment, which is within the statutory timelines provided under section 79G of the *Civil Procedure Act*. As such, the preliminary objection dated March 15, 2021 is unmerited and the same is dismissed

Whether the trial court erred in relying on a valuation report conducted by valuers instructed by the respondent

18. Section 97(1) and (2) of the *Land Act*, embodies the duty of care owed to the chargor by the chargee. The duty therein is no more than "to obtain the best price reasonably obtainable at the time of sale." section 97(1) and (2) of the *Land Act* provides as follows-

“A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer”

19. The court in *Koileken Ole Kipolonka Orumos v Mellech Engineering & Construction Limited & 2 others* [2018] eKLR held that-

“...the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under section 97(2) of the *Land Act* is statutory and obligatory. It is not left to the whims of the chargee and its agents especially the auctioneers.”



20. In this case, the trial magistrate held that there was a huge difference in the forced sale values between the valuers for both the appellant and respondent since the appellant's valuer arrived at Kshs 600,000/=, while the respondent's valuer arrived a figure of Kshs 2,000,000/=. The said magistrate found that the difference in the two valuations was substantial and in his opinion, it put the integrity of the appellant's valuer's report to question, since in the appellant's valuation report, the property had been described as being 5 bedrooms in size, while the actual size of the property was 12 or 14 rooms as per the respondent's valuer's report which was submitted in evidence. The trial magistrate found that the valuation by the appellant's valuer was a gross undervalue since the property's location was near an airport.
21. In this appeal, the appellant argues that the valuation report by the respondent's valuer was prepared solely for the purposes of being used as evidence during trial and that the respondent having paid the valuer to conduct the said valuation, then the said valuation is not a reliable expert opinion, and the trial magistrate ought not to have placed much probative value on the said valuation report.
22. The trial court was faced with two conflicting valuation reports conducted approximately one year apart. The trial court was persuaded by the expert report furnished by the respondent's valuer and it opted to rely on the said report in arriving at a finding that the valuation by the appellant was a gross undervaluation.
23. The Court of Appeal in *Kenya Ports Authority v Modern Holdings [E.A] Limited* [2017] eKLR, held as follows:

“We agree with the learned judge that in the event of conflicting expert evidence, it is the duty of the court to consider the evidence and form its own opinion. However, in so doing, the court must give cogent reasons why it prefers the evidence of one expert over the other. (See *Ndolo v Ndolo* [2008] 1 KLR (G&F) 742).” (emphasis added).

24. In *Mohammed Ali Baadi & others vs The Attorney General & 11 others* [2018] eKLR, a 5 judge bench held as follows on the factors the court will take into account when deciding the weight to be given to expert evidence-

“Firstly, expert evidence does not “trump all other evidence.” It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is cogent and give reasons why the court prefers the evidence of one expert as opposed to the other. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact.”



25. In this instance, the trial magistrate noted that there was a huge difference in the valuation of the property in issue and that it brought into question the integrity of the expert reports. He further went ahead and stated that it was not logically possible to arrive at such conflicting figures considering the reports were prepared just over a year apart. The said court relied on the evidence of the respondent on the actual size of the property which contained 12 to 14 rooms. In so doing, he concluded that the appellant's valuation report described the suit property as being five bedrooms in size, which resulted to a gross undervaluation of the property. Further, the court took note that the property was situated near an international airport, which inevitably enhances its value.
26. This court's finding is that in light of the conflicting expert reports, the trial court considered the evidence on record and formed its own opinion, which was that the valuation by the appellant's valuer was a gross undervaluation. In this court's view, the court gave cogent reasons for preferring the valuation report relied on by the respondent as compared to the one by the appellant. The appellant was ordered to pay the respondent Kshs 1,000,000/= as damages. No tangible reasons have been given as to why this court should depart from the holding by the trial court.
27. The submission by the appellant's counsel that the valuation report relied on by the appellant should not be considered is not persuasive as the appellant on its part had instructed its valuer to value the respondent's property, which valuation was found wanting by the trial court.
28. In the result, I find no merit in the appeal herein and it is dismissed with costs to the respondent. The respondent will have half of the costs of the lower court case as ordered by the trial court. The award of interest to the respondent is also upheld.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF MARCH, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued

by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the appellant

No appearance for the respondent

Mr. Oliver Musundi- Court Assistant.

