



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 22 OF 2019**

**THE MANAGER KCB .....1<sup>ST</sup> APPELLANT**

**KENYA COMMERCIAL BANK LTD, KISUMU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**THOMAS OBAGA ONSONGO.....RESPONDENT**

**(Being an appeal from the judgment and decree of Hon. N.S. Lutta, SPM delivered in Kisii CMCC No.285 of 2002 on 23<sup>rd</sup> January 2019)**

**JUDGMENT**

1. The appellants herein were the defendants while the respondent was the plaintiff before the trial court. From what can be gleaned from his further amended plaint the respondent's claim against the appellants was that he had borrowed a sum of Kshs. 350,000/= from the appellant and had offered land parcel Central Kitutu / Daraja Mbili/738 as security for the loan. He averred that he had been servicing the loan and as of the year 2002, his balance was only Kshs. 77,000/=. He claimed that despite this, the appellants, without issuing him with a statutory notice, caused the land to be sold by auction on 16<sup>th</sup> October 2001 and never paid him the excess after the sale of the land.

2. Further, the respondent claimed that the appellants had dismissed him from work and refused to pay his pension of Kshs. 169,833/=. His claim against the appellants was for payment of the value of the house, his remaining pension of 8% and interest accrued at court rates and an actuarial certificate from a recognized firm.

3. The respondent adopted his statement and listed documents as his evidence at the hearing before the trial court. In his written statement, he claimed that at the time his land was sold off, an injunction had been issued by the court prohibiting the sale of the land until the determination of the suit but the appellants still went on to sell it. He stated that he also presented a buyer for his property but the manager who had terminated his services, declined his proposal for repayment of the loan. He urged the court to declare the sale illegal and order that he be paid the value of the house. He also claimed that the respondent had paid 6% of his pension as opposed to 14% and a balance of 8% remained unpaid.

4. He reiterated his averments in cross examination and further stated that he had made a claim for his pension to the pension fund trustees and also forwarded the matter to the Retirement Benefits Authority.

5. The appellants denied the respondent's assertions and averred that he had made erratic and infrequent payments of his loan and as of 20<sup>th</sup> February 1997, the debt from him stood at Kshs. 90,008. They claimed that the respondent had been issued with a statutory notice under Section 77 of the Registered Land Act dated 25<sup>th</sup> February 1997 and when he failed to redeem the debt, the 2<sup>nd</sup> appellant's statutory power of sale of the charged property crystallized.

6. The appellants claimed that following two failed attempts to auction the property, the application of interest accruing and expenses the debt increased to Kshs. 419,443.45/=. They were finally able to sell the property at Kshs. 300,000/= to one Tom Nyanga'ao Nyachieo whereupon the respondent lost the right to redeem the property. They averred that they had issued the requisite notices in line with the Auctioneer's Act and had written off the balance of Kshs. 118,471.35 since the sale was not enough to clear the outstanding loan.

7. As for the respondent's claim for payment of his pension, the respondents stated that the respondent had engaged the 2<sup>nd</sup> appellant at the Retirement Benefits Tribunal and received full payment of his pension sometime in 2012 through his advocates.

8. The appellants' witness, Abraham Terit Kapelo (DW 1), confirmed that the respondent had applied for the loan from the bank in 1992. He explained that when an application for loan was made a security had to be offered and a valuation of the property carried out. DW 1 reiterated that by the time the property was sold, the appellant was in arrears of Kshs. 419,443/=. Having defaulted in the payment of the loan, the property was sold off on 6<sup>th</sup> October 2001 for Kshs. 300,000/=. He also testified that the respondent had been given the loan at an

interest of Kshs. 3% and the interest rate at the time of sale was 32.9%.

9. After the close of the case, the trial court dismissed the respondent's claim for pension as it had been dealt with by the Retirement Benefits Authority. The court proceeded to find that the respondent's land was agricultural hence the 2<sup>nd</sup> appellant had a duty to serve a notice to the District Commissioner in line with **Section 77 (6)** of the **Registered Land Act**. The court also found the 2<sup>nd</sup> appellant liable for selling the respondent's property in bad faith having ignored a letter from the Union asking it to hold off from selling the house due to the industrial action between the bank and the respondent. The court found that when the land was auctioned, the respondent was not in a position to obtain a valuation report for the property and thus made the following final orders;

- a. *The defendant do hereby pay the Plaintiff the value of the house on condition that the parties agree on a valuer who shall then value the property and file a report within 30 days from the date of judgment;*
- b. *The defendants be at liberty to calculate the amount owed and interests from the time the property was sold to date of judgment and file a report on the same for consideration;*
- c. *The plaintiff is hereby awarded the costs and interests of the suit.*

10. Being dissatisfied with those orders of the court, the respondents filed the present appeal. The parties took directions to dispose of the appeal by way of written submissions which were briefly highlighted in court. The written submissions were in detail with authorities to support the arguments advance by the parties.

11. Having considered the submissions alongside the record of appeal I find that the issues arising for determination are as follows;

- a. Whether the respondent's pleadings revealed any cause of action;
- b. Whether the trial court erred by reaching conclusions of fact that were not founded on evidence;
- c. Whether the trial magistrate erred in fact by finding that the appellants did not issue the requisite statutory notices before exercise their statutory power of sale;
- d. Whether the trial court's judgment amounted to calling evidence after judgment.

12. On the first issue, Ms. Auma, learned counsel for the appellant argued that the trial court had erred by considering and determining the suit on unpleaded issues. She submitted that the respondent had bizarrely effected amendments to his previous pleadings deleting all the facts and circumstances giving rise to his cause of action and had only left paragraph 7AA in which he averred;

*"7AA. The plaintiff's claim against the Defendants is for payment of the value of the house, the remaining pension paid at 8 % and interest accrued at court rates and actuarial certificate from recognized firm."*

13. The respondent had sought the value of the house and his remaining pension but the identity, location and value of the house and the value of the pension claimed were neither pleaded nor proved. Counsel submitted that the court's determination on *"whether the defendant sold the plaintiff's property unprocedurally and illegally,"* was erroneous since this issue had not been pleaded in the further amended plaint. She contended that the further amended plaint lacked the operative facts and did not raise any cause of action; therefore the trial court went over and above its mandate in crafting a cause of action for the litigants.

14. In response Mr. Nyagwencha, learned counsel for the respondent, termed it as a wrongful cancellation of the pleadings and an error curable under **Article 159 (2)** of the **Constitution**. He contended that the defence was not prejudiced by the mistake as it had filed a detailed amended defence in response. He also submitted that the further amended plaint had not been challenged in the lower court and it was therefore erroneous to challenge it on appeal.

15. First, it is important to point out that the trial court, by a ruling dated 23<sup>rd</sup> February 2007, struck off the name of the 1<sup>st</sup> appellant from the suit and no appeal was preferred against that decision.

16. As for the pleadings, it is puzzling that the parties and the trial court proceeded with the matter notwithstanding the manner in which the plaint had been amended. In his further amended plaint, the respondent crossed off all the particulars in the plaint other than paragraph 7 AA, set out above and the prayers he sought against the appellants.

17. **Order 8, Rule 7** provides the mode of amendment of pleadings in the following terms;

7 (1) ...

*(2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.*

*(3) Colours other than red shall be used for further amendments to the same document.*

18. The rules are in mandatory terms and cannot be deviated from. The court in **Peter G.N. Nganga & another v Kenya Finance Bank**

**Limited(In Liquidation, Liquidating Agent The Deposit Protection Fund) & 3 others Civil Suit No 1135 of 2001 [2014] eKLR** had a similar take on the absolute nature of the foregoing rules.

19. On the respondent's contention that the striking out of nearly all particulars of the plaint was a technical error, I am in agreement with the decision of Kiage J in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] Eklr** thus;

*"... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."*

20. The issues for determination in a suit will generally flow from the pleadings. **Order 4 Rule 3** of the **Civil Procedure Rules** provides that where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it. The plaintiff is also required to show the claim that the defendant is being called upon to answer in line with **Order 4 Rule 5**. A court shall only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. (See **Peter Gichuki King'ara v Independent Electoral And Boundaries Commission & 2 others Civil Appeal No. 23 of 2013**) By striking off the operative clauses, the respondent's claim had nothing to stand on and ought to have been dismissed by the trial court.

21. That said, I have analysed the evidence afresh as is required of a first appellate court and the substantive issues raised in the appeal and have found that the respondent's case would still be unsuccessful if he had properly pleaded his case.

22. The agreed facts are that the respondent was an employee of the appellant from 1984 until 1996 when his services were terminated. In the course of his employment, he applied for a loan from the 2<sup>nd</sup> respondent and gave his land parcel no. Central Kitutu/DarajaMbili/738 as security for the facility. According to the letter of offer produced as D. Exh 1 by the respondents' witness, the loan facility for Kshs. 300,000/= was issued in 1992 and was to be repaid over a period of 9 years in monthly instalments of Kshs. 3,174/=. The agreed interest rate for the loan was 3% with a penalty rate of 21.5%.

23. The respondent did not deny that he defaulted in paying off the loan as agreed. His complaint was that the bank sold off his property without issuing him with the requisite notices before the sale. He told the court he only learnt about the sale years later when he got evicted from the land.

24. The applicable law at the time was therepealed **Registered Land Act. Section 74** of the Act gave the chargee the right to sell charged property where the charger was in default after service of a written notice. That provision stipulated;

*74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.*

*(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may –*

*(a) appoint a receiver of the income of the charged property or*

*(b) sell the charged property ...*

25. In the case of **Nyangilo Ochieng' & Another v Kenya Commercial Bank Civil Appeal No. 148 of 1995[1996]eKLR** the Court of Appeal at Kisumu held that where a chargor alleged non receipt of the statutory notice, the chargee was required to prove that such a notice had actually been sent to the chargor. To discharge this burden, the appellants produced a letter dated 25<sup>th</sup> February 1997. The letter notified the respondent that the property would be sold within 3 months if he did not pay the debt of Kshs. 90,008/= which was accruing an interest at the rate of 32.9% per annum.

26. I agree with the trial court that the letter from the trade union representing the respondent dated 22<sup>nd</sup> August 1997, proved that the respondent was duly notified of the intended sale. In the letter the trade union asked the 2<sup>nd</sup> appellant to put off the sale as it had lodged an industrial dispute against the 2<sup>nd</sup> appellant for wrongful termination of the respondent's services.

27. I however agree with the appellants' counsel that the trial court erred in coming to the conclusion that the charged property was agricultural land and that a notice had to be served to the District Commissioner in accordance with **Section 77 (6)** of the **Registered Land Act** which provided that;

*77(6) Where the charged land is agricultural land the chargee shall, at least one month before exercising his power of sale, serve a notice on the District Commissioner of the area in which the charged land is situated of his intention thereof; ...*

28. The appellants' counsel submitted that the land in question was located within Kisii Municipality and did not qualify as agricultural land as defined by **Section 2** of the **Land Control Act** which defines agricultural land as land that is not within a municipality or township, trading centre or market. There was indeed nothing in the pleadings or evidence to support the finding that the charged land was agricultural land. I therefore find that the trial court erred by impugning the 2<sup>nd</sup> appellant's exercise of statutory power of sale for failure to serve the notice under **Section 77 (6)** of the repealed **Act**.

29. Upon perusing the evidence on record, I found that the 2<sup>nd</sup> appellant's exercise of statutory power of sale was not without fault. The respondent stated that he had not served with a notice of the public auction and that he only learnt of the sale years after it had been sold. According to the Notification of Sale produced by the appellants which was dated 14<sup>th</sup> August 2001, the firm of Jogi Auctioneers notified the respondent that his land would be sold within 45 days if he failed to pay the debt which was KShs. 419,443.95/= at that time. The auctioneers were required to serve the notice on the respondent in accordance with **Rule 15** of the **Auctioneers Rules, 1997** but there was no proof of such service.

30. A chargor aggrieved by an improper or irregular exercise of the statutory power only had a remedy in damages according to **Section 77 (3)** of the repealed Act. (See also **Edward Charles Nginyo v Hans Jurgen Zahlten & 4 others Civil Appeal No. 34 of 2015 [2015] eKLR**) Havelock J. observed that the nature of damages sought could be general or special damages.

31. In the present case, the respondent made a claim for the value of the house which was a claim for special damages. It is a known principle of law that special damages need to be specifically pleaded and be strictly proved with as much particularity as circumstances permit before they can be awarded. ( See **Mitchell Cotts (K) Ltd v Musa Freighters Civil Appeal No 104 of 2006 [2011] eKLR** and **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited Civil Appeal No. 189 of 2014 [2016] eKLR**)

32. Even assuming the respondent had properly amended his pleadings, he failed to specify the value of the house he sought payment for. In my view, the respondent's claim would have better chances of succeeding if he instead sought general damages against the 2<sup>nd</sup> appellant.

33. The sale of the house took place nearly two decades ago and had been overtaken by events by the time the trial court entered judgment in favour of the respondent. The appellants had also stated that they had written off the remainder of the debt owed by the respondent after the sale of the property. It would have been more prudent for the respondent to make an application for taking of accounts in the course of the proceedings if he wanted to ascertain the debt he owed to the appellants. It is also noteworthy that the agreement between the parties was categorical that an interest rate of 21.5% p.a. from the standard 3% p.a. would be applied as a penal rate and the claim by the appellant that the debt had increased to KShs. 419,443.45/= does not seem farfetched especially given DW 1's statement that the bank had attempted to sell the property unsuccessfully.

34. The court's orders that the parties appoint a valuer to value the property and calculate the amount of loan owed to the appellant within 30 days was erroneous as it was contrary to the principle that a court should not reopen a matter in which it has rendered a final decision.

35. Counsel for the respondent argued that the court's direction for a valuation to be conducted after judgment was made in order to actualize the implementation and effectiveness of the order of the court for payment of the value of the house. He argued that the court had made this decision based on its inherent jurisdiction to make orders that were necessary to meet the ends of justice.

36. The principle of *functus officio* was defined by the Court of Appeal in **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) Civil Appeal No. 60 Of 2013 [2014] eKLR** thus;

*Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...*

*The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.*

37. In the persuasive case of **Bellevue Development Company Limited v Vinayak Builders Limited & another Civil Case No 571 of 2011 [2014] eKLR**, the court warned against overstretching the principle and advised that the order or relief sought would determine whether the court was *functus officio* or not. In the words of the court;

*"... care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court."*

38. As already held above, the respondent's claim was for special damages. He failed to plead his case as required and the court ought to have dismissed his claim. By ordering the parties to carry out a valuation of the house, the court left the question unresolved especially given the fact that the trial court's judgment was silent on what value of the house would apply; whether at the time of the auction or at the time of judgment. It was also not established if the house, which was sold to a third party, still exists and if it did exist, whether any developments have been made to it.

39. I am guided by the holding in the case **Alliance One Tobacco Kenya Limited v Kenya Union of Commercial Food and Allied Workers & 5 Ors Civil Appeal No. 50 of 2016 (unreported)**, where the Court of Appeal stated that ;

*“The Judge in the end pronounced a final judgment and not a preliminary decree but apparently because the parties had not made specific pleadings or placed material before him to enable him to make final pronouncements ordered that the parties file a computation in a way that could very well lead to further hearing of the case. The learned Judge was not entitled to do so. The 2<sup>nd</sup> to 6<sup>th</sup> respondents were duty bound, as we have shown, to specifically plead and prove the case on special damages and place before the Judge relevant material from which the court could make computations on what, if any they were entitled to.”*

40. In the end, I find this appeal merited and allow it with costs to the 2<sup>nd</sup> appellant.

**Dated, signed and delivered at KISII this 26<sup>th</sup> day of February 2020.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Appellant Absent**

**Miss Shilwatso h/b Mr. Nyagwencha For the Respondent**

**Ms. Rael Court Assistant**