



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 02 OF 2014.

CHRISPO OKINDA MIEN.....APPLICANT.

VERSUS

KENYA COMMERCIAL BANK.....1<sup>ST</sup> RESPONDENT.

KEYSIAN AUCTIONEERS.....2<sup>ND</sup> RESPONDENT

ANTONY ODHIAMBO OWAGA.....3<sup>RD</sup> RESPONDENT

J U D G M E N T.

**BACKGROUND:**

1. **CHRISPO OKINDA MIEN**, hereinafter referred to as the Appellant, being dissatisfied with the judgment of Hon. Mildred Munyekenye, Senior Resident Magistrate in Busia CMCC. NO. 206 of 2011 of 14<sup>th</sup> February, 2014 preferred this appeal setting out seven grounds as shown herein below;

"1. The learned Trial Magistrate erred in law and in fact in making a finding that a statutory notice and or a proper statutory notice had been issued to the Appellants by the 1<sup>st</sup> Respondent, through 2<sup>nd</sup> Respondent, without any evidence of such notice and or service of such notice upon the Appellant."

2. The Learned Trial Magistrate erred in law and in fact in finding that a public auction took place on 27/5/2011 outside Busia Post Office whereby Land Parcel No. South Teso/Angoromo/1373 was sold in pursuant to a purported exercise of statutory power of sale by 1<sup>st</sup> Respondent whereas there was no evidence to that effect.

3. The Learned Trial Magistrate erred in law and in fact by finding that the land subject matter of litigation South Teso/Angoromo/1373 was not in existence and thereby failed to issue an order of injunction against disposal, whereas there existed evidence that the suit property was existing during commencement of suit and the purported disposal was by fraud to defeat justice.

4. The Learned Trial Magistrate erred in law and in fact in making a finding that the Appellant was Not entitled to cost upon dismissal of the counter claim by the 3<sup>rd</sup>

Respondent, and thereby failed to appreciate that a counter claim is a suit independent of the parent suit and upon its dismissal cost follow events.

5. The Learned Trial Magistrate erred in law and in fact in failing to include and allude to crucial evidence of fraud on part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent as regards the purported sale of land No. South Teso/Angoromo/1373 and evidenced by testimony of PW 1 and PW 2 and on the exhibits produced by both the Appellant and the Respondents and thereby arrived at an erroneous finding in favour of Respondents.

6. The learned Trial Magistrate erred in law and in fact in failing to find that the Appellant was entitled to prayers sought having proved his case on the standard required by law since both the plaint and counter claim confirmed the existence of the suit property trial.

7. The Learned Trial Magistrate erred in law and in fact to draw real issues that were indeed between the parties, listing each, and making decision on them and thus considered irrelevant issues to the detriment of the Appellant.’’

2. The Appellant named Kenya Commercial Bank, Keysian Auctioneers and Antony Owaga Odhiambo as the 1<sup>st</sup> to 3<sup>rd</sup> Respondents respectively and they will be referred as such hereinafter. The Appellant filed a notice of motion dated 19<sup>th</sup> February, 2014 under certificate of urgency dated 21<sup>st</sup> February, 2014 in the Lower court file and interim orders of stay were issued on 24<sup>th</sup> February, 2014. The interim orders were subsequently extended severally by this court and eventually allowed by consent of parties counsel on 10<sup>th</sup> November, 2014. The counsel also consented to have the appeal dealt with through written submissions and timelines were given and extended with a final period of 14 days from 16<sup>th</sup> February, 2015 for the Respondents. When the matter came up on 5<sup>th</sup> March, 2015 to confirm the filing of submissions and fixing a date for judgment, the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was absent and had not filed submission within the time. The counsel holding his brief notified the court that the submissions had just been filed on that date. The court fixed 23<sup>rd</sup> April, 2015 as the date for judgment. Thereafter the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed a notice of motion under certificate of urgency dated 12<sup>th</sup> March, 2015 seeking to have the submissions filed on 5<sup>th</sup> March, 2015 to be deemed as properly filed. The application was certified urgent on 17<sup>th</sup> March, 2015 to be heard on priority basis. The counsel for the 3<sup>rd</sup> Respondent has already filed grounds of opposition dated 18<sup>th</sup> March, 2015. The record shows that the application was fixed for hearing on 25<sup>th</sup> March, 2015 but there is no indication of what happened on that date. So as to avoid any further delay in this matter, the court has on its own motion taken the submissions filed by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 5<sup>th</sup> March, 2015 to be properly before the court in spite of being filed outside the time set. This will enable the court to proceed to prepare its judgment without any further delay.

This being a first appeal, this court is under duty to examine and evaluate the evidence on record and arrive at its own conclusion bearing in mind that it did not have the advantage of observing the demeanor of the witnesses during trial (*see Seller –vs- Associated Motor Boat Company Limited* (1968)E.A. 123)

### 3. ANALYSIS OF THE EVIDENCE

(a) The Appellant had filed Busia SPM . CC. No. 206 of 2011 against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the plaint dated 19<sup>th</sup> July, 2011 seeking for permanent injunction in respect of South Teso/Angoromo/1373, taking of accounts in respect of the charge of the said land and costs. The 3<sup>rd</sup> Respondent later filed Busia SPM. CC.NO. 301 of 2011 through the plaint dated 20<sup>th</sup> September, 2011 and later amended on 18<sup>th</sup> October, 2011 in which he prayed for eviction orders against the Appellant in respect of the same suit land, removal of caution and costs.

The two matters were consolidated by consent on 30<sup>th</sup> March, 2012 with the latter case being

treated as a counterclaim (*see page 21 of the record of appeal*)

(b) The Appellant's evidence in the court proceedings is at page 32 of the record of appeal. He conceded to having taken a loan of Kshs.75,000/= from the 1<sup>st</sup> Respondent and '**put the title deed of (South Teso/Angoromo/1373) as security .**' In the year 2010, the Appellant visited the 1<sup>st</sup> Respondent and learnt that the loan balance stood at Kshs.480,000/= and after paying Kshs.70,000/= on 29<sup>th</sup> October, 2010, the balance stood at Kshs.410,000/=. The Appellant stated that later he learnt from Church members, specifically Pastor Maureen, that his land had been advertised for auction in the newspapers. He said he had not been served with any communication about the auction and that he did not have postal address. Julius Wandera Mudibo, a pastor with Kings Outreach Church Busia, also testified on their interest to buy one acre of the suit land from PW 1 at Kshs.1,600,000/=.He also told how he accompanied PW 1 to the bank where the title to the land was charged and paid Kshs.70,000/= on 29<sup>th</sup> October, 2010 after which the bank gave them one year to pay the balance. PW 2 also told how on learning that the land had been advertised for auction, he accompanied DW 1 to the auction venue on 27<sup>th</sup> May, 2011 but did not find any such function taking place.

On behalf of 1<sup>st</sup> Respondent, Elijah Simi Ochoma and Ferdinard Kalatwen Mangeni testified as DW 1 and DW 3 and told of the loan facility of Kshs.75,000/= the bank gave PW 1 upon securing a legal charge on his land South Teso/Angoromo/1373. That upon PW 1 defaulting, the bank issued legal notices to recover and instructed the 2<sup>nd</sup> Respondent to auction the property. DW 3 stated he was present during the auction on 27<sup>th</sup> May, 2011 when the property was sold to 3<sup>rd</sup> Respondent who testified as the Interested Party. (*See record of appeal at page 65*) Muganda Wasuilwa who is the 2<sup>nd</sup> Respondent testified as DW 2. The evidence tendered shows that the Appellant charged the suit land with the 1<sup>st</sup> Respondent for a loan of Kshs.75,000/= in February, 1988. The Appellant had given the 1<sup>st</sup> Respondent his postal address as P.O. Box number 379, Busia as seen in the charge document produced as defence exhibit 2. The Appellant signed the said charge document and has not disputed any of its contents. As there is no other address that the Appellant had given to the 1<sup>st</sup> Respondent, the latter was in order to send their notices to the Applicant through the address in their possession.

(c) The Learned trial Magistrate addressed herself to the issue of the statutory notices issued and served on the Appellant before the auction and found as follows; at page 8 line 21 of the record of appeal;

***“.....I find that a notice for sale of land parcel number South Teso/Angoromo/1373 was duly given to the Plaintiff.”***

This court finds that the Learned Trial Magistrate properly analyzed the oral and documentary evidence presented before the court and came to the correct finding in respect to the statutory notices being issued and served for the following reasons

- i. That the letter dated 10<sup>th</sup> February, 1998 from 1<sup>st</sup> Respondent to Appellant, that preceded the charge document, clearly indicated that the loan facility was to be repaid within 3 years in monthly instalments of Kshs.3,000/= inclusive of interest. The three years were to run between February, 1988 to February, 1991. The Appellant has not disputed that by the time of the contested auction of 27<sup>th</sup> May, 2011, he was in arrears to the tune of over Kshs.400,000/=.
- ii. That the 1<sup>st</sup> Respondent had done the first demand notice dated 12<sup>th</sup> May, 1989 followed by a second one dated 22<sup>nd</sup> December, 1989. The notices were addressed to the only postal address the Appellant had given the 1<sup>st</sup> Respondent being Box number 379, Busia. This was in accordance with paragraph 6 (i) of the charge document which reads as follows:-

***“ that any notice required or authorized by law or by this charge to be served by the Bank on the chargor shall be sufficiently served if it be sent by Post in a stamped envelope addressed to the chargor at his last known postal address in Kenya or if it be delivered to the place of business of the chargor to the charged property AND THAT***

***Proof of posting shall be proof of service.”***

- iii. The 1<sup>st</sup> Respondent therefore acted in accordance with the provision of section 74 of the then Registered Land Act Chapter 300 of Laws of Kenya instructing the 2<sup>nd</sup> Respondent to realize the charge as the Appellant was in arrears.
- iv. The 2<sup>nd</sup> Respondent then wrote to the Appellant on 21<sup>st</sup> March, 2011 giving him 45 days. The notice was sent by registered post to the address the Appellant had given 1<sup>st</sup> Respondent and a certificate of posting was produced as exhibit. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents had discharged their duty to show that proper notices had been issued and served on the Appellant (*see Kisumu Court of Appeal C.A. NO. 148 of 1991, Obel Omunan –vs- Kenya Commercial Bank Ltd. eKLR*)

d) The Learned Trial Magistrate also considered whether or not the advertised auction took place on 27<sup>th</sup> May, 2011 and after analyzing the competing oral evidence of both sides and the documentary evidence presented, found as follows;

***“From the documentary evidence produced by the defendants, I find that indeed an auction took place on 27<sup>th</sup> May, 2011 for parcel number South Teso/Angoromo/1373 and the successful purchaser was the Interested Party.”***

The weight of the evidence given by PW 1 and PW 2 on one side, against that given by DW 2, DW 3 and Interested Party on the other side, sways in favour of a finding that both the oral and documentary evidence presented by the Respondents before the learned trial Magistrate shows that South Teso/Angoromo/1373 was indeed auctioned as advertised and the highest bidder was the 3<sup>rd</sup> Respondent. There was no evidence of fraud presented before the trial court by any of the parties. The Appellant was under duty to give particulars of fraud in his pleadings and avail evidence to support such particulars in the lower court proceedings but failed to do so. The Appellant therefore lost the opportunity to redeem the property on the fall of the hammer on the auction day. See the court of appeal case of *Mbuthia –vs- Jumbo Credit Finance corporation & Another* C.A. No. 111 of 1986 where it was held;

***“.....by virtue of the security being registered under the RLA, the equity of redemption was lost at the fall of the hammer at auction sale. This is because at the fall of the hammer, the highest bidder is declared the purchaser and binding contract of sale is concluded.”***

(e) That the Learned Trial Magistrate properly addressed herself on the issue of costs and found as follows at page 11 of the record of appeal;

***“ Since both Plaintiff’s suit and the counterclaim have been dismissed, the Plaintiff and the Interested Party will each bear their costs as against each other.”***

The general rule as to costs is provided under section 27 of the Civil Procedure Rules. This provision has been considered in several judicial pronouncement by the Superior Courts (*See Supermarine Handling Services ltd –vs- Kenya Revenue Authority C.A.C. A No. 85 of 2006 and R-V-The Medical Practitioners and Dentist Board and 3 others Exparte Kenya Hospital Association [2014] eKLR*).

The general thread in the decisions is that though ordinarily costs follow the events and successful litigants should have costs, the trial court has some discretion. The discretion should however not be arbitrary but exercised judiciously. In this case, the Appellant and the 3<sup>rd</sup> Respondent failed in their respective cases which had been consolidated for hearing. The learned trial Magistrate could have ordered the Appellant and 3<sup>rd</sup> Respondent to pay the costs to the opposite side upon their suits being dismissed but instead ordered each party to bear their own costs as between themselves. This court finds that the learned trial Magistrate exercised her discretion judiciously and the order serves the justice in the case and cannot be said to be arbitrary.

**4. FINDING.**

For reasons set out above, the court do not find any merit in any of the grounds set out by the Appellant and the following orders are issued;

- a. The appeal is dismissed with costs.
- b. The learned trial Magistrate orders of 14<sup>th</sup> February, 2014 are upheld.
- c. The orders granted in respect of the application dated 20<sup>th</sup> February, 2014 are hereby vacated.

It is so ordered.

**S. M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 23<sup>RD</sup> DAY OF APRIL, 2015.**

**IN THE PRESENCE OF PRESENT .....APPELLANT**

**...N/A.....1<sup>ST</sup> RESPONDENT**

**...N/A.....2<sup>ND</sup> RESPONDENT**

**...PRESENT.....3<sup>RD</sup> RESPONDENT**

**MR. MAKOKHA FOR APPELLANT, MR. JUMBA FOR MUKELE FOR 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENT AND MR. ONSONGO FOR ASHIOYA FOR 3<sup>RD</sup> RESPONDENT.**

**JUDGE.**