



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC APPEAL NO. 3 OF 2021

BANK OF AFRICA KENYA LIMITED.....APPELLANT

VERSUS

JOHN NDUNG’U GACHARA.....RESPONDENT

(Being an appeal from the ruling of the Hon. D. Mosse, Senior Resident Magistrate

delivered on 9th February 2021 in ELC No. 166 of 2020 in Nakuru)

JUDGMENT

1. This appeal arises from the ruling of Hon. D. Mosse Senior Resident Magistrate delivered on 9th February, 2021 in Nakuru ELC No.166 of 2020 in an interlocutory application for injunction by the Respondent who was the plaintiff before the Lower Court. The learned trial Magistrate allowed the application on the ground that the Respondent had a strong case and stood to suffer greater harm if the injunction was not granted, whereas the appellant in such event, would not suffer any harm as it would if successful in the suit still be able to sell the charged property to recover any outstanding loan amount. The learned magistrate’s view was that the respondent would suffer greater harm than the bank if the injunction was denied.

2.The appellant dissatisfied and aggrieved by the ruling of the Hon. Senior Resident Magistrate has appealed to this Court and has set out nine grounds of appeal which are set out hereunder:-

1.That the trial magistrate erred in law and fact by upholding the prayers sought by the Plaintiff in the application dated 7th October, 2020.

2. That the trial magistrate erred in law and in fact by dismissing the Preliminary Objection of the 1st Defendant which challenged the jurisdiction of the court.

3. That the trial magistrate erred in law and in fact in holding that the Preliminary Objection would not lead to a determination of the matter.

4. That the trial magistrate mis applied the law when she held that the preliminary objection merely sought to have the matter filed in a different court as opposed to having it dismissed/terminated.

5. That the trial magistrate erred in law and fact in failing to deal with the issue of jurisdiction which was fundamental in vesting the court with the power to handle the dispute before it.

6. That the trial magistrate erred in law and fact in failing to consider evidence of the Respondent on notices given to the plaintiff on the issue of change in the rate of interest.

7. That the magistrate erred in law and fact in finding that the Plaintiff/Applicant had established a prima facie case when in fact the 1st Defendant/Respondent had adduced evidence to show that the Plaintiff/Applicant was misleading the court.

8. That the magistrate erred in law and fact by failing to consider various admissions by the Plaintiff/Applicant that he was in arrears and had defaulted on the terms of the charge.

9. That the magistrate erred in fact and law by failing to consider evidence of the 1st Defendant/Respondent that the Plaintiff/Applicant had breached the contract between him and the bank.

3. Based on those grounds the Appellant prayed that this court allows the appeal and sets aside the said ruling.

4. The appeal was canvassed through written submissions which both the Appellant and the Respondent duly filed.

5. The grounds of appeal can conveniently be condensed into two broad grounds thus:-

(i) Whether or not the trial magistrate erred in dismissing the 1st Defendant's Preliminary objection dated 2nd November, 2020.

(ii) Whether or not the Respondent herein was entitled to the temporary injunction as sought in his application dated 7th October, 2020.

6. In order to contextualise the basis of the present appeal, it is necessary to briefly set out the facts of the case before the subordinate Court. The Respondent by way of a plaint dated 7th October 2020 filed on the same date sought permanent injunctive orders against the appellant restraining any sale, disposal or alienation and/or interference with land parcel Miti Mingi/Mbaruk Block 5/165 (Kianjoya B), and a declaration that the Appellant's statutory power of sale had not accrued as against the charged property Miti Mingi/Mbaruk Block 5/165 (Kianjoya B). Simultaneously with the plaint the Respondent filed a Notice of Motion application praying for a temporary injunction to prevent the sale of the charged suit property by the Appellant in exercise of its statutory power of sale. The respondent averred that the Appellant advertised the suit property for sale by public auction without serving the necessary statutory notices as provided for in the law and thus argued the intended sale of the suit property by the appellant was unlawful and a nullity.

7. The Appellant filed a replying affidavit in opposition to the Respondent's application. The appellant clarified that the loan advanced to the Respondent was secured by two charges of Kshs.1,600,000 as the first charge, and Kshs.2,720,000 as the further charge making a total of Kshs.4,320,000. The Appellant contended that the offer letter clearly stated that the interest of 5% would only be applicable for as long as the Respondent (borrower) was an employee of the Appellant and that the interest rate would vary if he left employment. The Appellant averred that it accepted the Respondent's resignation and thereafter wrote to the Respondent vide a letter dated 9th May, 2019 notifying him that the interest rate applicable to his loan would be the prevailing commercial rates commencing 1st July, 2019.

8. The Appellant further stated that it was within its rights to vary the interest rate applicable and that the Respondent never showed any good will or intention to settle the loan amount owing to the Appellant despite several demands to regularize his account. The Appellant stated that the loan amount outstanding as at 15th October, 2020 stood at Kshs.4,821,396.71 and that at all times preceding the intended sale of the charged property it complied with the relevant legal provisions pertaining to service of the statutory and redemption notices which were duly served via registered post on the Respondent. The Appellant finally averred that the Respondent never denied being indebted to the bank and therefore the appellant was lawfully entitled to exercise its statutory power of sale to recover the amount outstanding.

9. The Appellant simultaneously with the replying affidavit filed a preliminary objection dated 2nd November, 2020 challenging the jurisdiction of the trial court to entertain the application on the basis that the matter was a commercial matter relating to the protection of the Appellant's interest in exercising its statutory power of sale under a charge instrument. The appellant contended the application for injunction was incurably defective and an abuse of the court process.

10. The parties before the lower court argued the application by way of written submissions and the learned Magistrate delivered her ruling on 9th February, 2021 where she dismissed the Appellant's Preliminary objection and allowed the Respondent's application for temporary injunction provoking the instant appeal.

11. The learned trial magistrate first dealt with the Appellant's preliminary objection on jurisdiction and though from the ruling there is lack of clarity, the learned trial magistrate was of the view that the preliminary objection did not satisfy the test of what constitutes a preliminary objection. In dismissing the preliminary objection the learned magistrate stated:-

“The preliminary objection raised herein does not lead to the determination of this matter but seems to ask that the matter should have been filed in a different court. That being the case and in the light of authorities cited above the preliminary objection raised fails and is dismissed with no order as to costs”.

12. On the temporary injunction sought by the Respondent, the trial magistrate was of the view that respondent stood to suffer greater harm than the Appellant as the charged property was his matrimonial property which risked being sold and thereby allowed the respondent's application for injunction.

13. In determining whether or not the learned trial magistrate was justified to reach the decision that she did, this court is obligated and indeed under a duty to re-evaluate the evidence and material that was placed before the subordinate court to determine whether the learned magistrate made the correct determination. As an appellate court of first instance the court is not bound by the findings of fact and law made by the lower court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of **Selle & Another -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123** where the court of Appeal stated as follows:-

“ this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 or heard the witnesses and should make due allowance in this respect”.

14. In the matter before the lower court in the present matter there was no oral evidence and the application was ruled upon on the basis of the pleadings, affidavit evidence and submissions of the parties.

15. The Appellant in its preliminary objection contended that as the dispute centred on its rights to exercise its power of sale under a banker and a borrower relationship, and the applicable interest rate on the loan, it was commercial in nature and fell within the jurisdiction of the commercial courts. The Respondent on the other hand argued that the lower court had jurisdiction to hear and determine the said application as the suit property fell within the pecuniary jurisdiction of the magistrates court of below Kshs.20 million.

16. In determining the first issue, it is necessary for this court to consider the applicable legal provisions relating to the jurisdiction of the relevant courts. Articles 162 and 169 of the Constitution of Kenya established courts of equal status with the High Court and the Subordinate courts respectively:-

162 (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Article 169 (1) (a) establishes the Magistrates courts amongst other subordinate courts. Article 169 (2) gives parliament the powers to enact legislation to confer jurisdiction and functions and powers on the courts established under Article 169 (1). Section 9 (a) of the Magistrate’s Court Act, 2015 confers magistrate jurisdiction to deal with environment and land matters subject to their pecuniary jurisdiction under section 7 (1) of the Act. Section 9 (a) of the Act provides: -

(9) A magistrate’s court shall: -

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

17. The Jurisdiction of the subordinate court was called into question by the Appellant who contended that it had no jurisdiction as the dispute arose from a loan facility extended to the Respondent by the appellant and concerned the rate of interest chargeable and whether the appellant’s power of sale conferred under the charge had arisen. The appellant contended the dispute was of a commercial nature and should have been instituted in the commercial courts.

18. The Respondent stated that the Appellant unilaterally converted the interest rate from the staff rate of 5% to commercial rate and further contended that he had not been served with the requisite statutory notices and redemption notice by the appellant and hence argued the right of the chargee to exercise the power of sale had not arisen.

19. The Appellant in support of the preliminary objection relied on the Court of Appeal decision in the case of **Cooperative Bank of Kenya - vs- Patrick Kangethe Njuguna & Others (2017) eKLR** – where the court of Appeal held that it was the High Court that had jurisdiction where under an instrument of charge, the amount owing and/or the tabulation was in issue. In the case of the court stated:-

“40. To the appellant, the charge was an instrument granting an interest in land, hence jurisdiction in the matter lay with the ELC. However, under section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale”.

20. The court further observed:-

“ 42 While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the constitution, section 13 of the ELC Act and section 150 of the Land Act; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165 (3) of the Constitution provides inter alia, that;

Subject to clauses (5), the high Court shall have-

a. Unlimited original jurisdiction in criminal and Civil matters.

For the above reasons, the appellants objection on jurisdiction was rightly dismissed.”

21. The Magistrates court have jurisdiction under the magistrates courts’ Act to exercise both criminal and Civil Jurisdiction (see sections 6 and 7 of the Act) The Civil jurisdiction of the magistrates Courts is only limited by the pecuniary jurisdiction granted to each cadre of the magistrates. Under section 26(3) of the Environment and Land Court Act, 2011, the Chief Justice is empowered to appoint certain magistrates to preside over cases involving environment and land matters. Once appointed such a magistrate while handling an environment and land related matter would only be limited by the value of the subject matter. The preliminary objection was not premised on the lack of pecuniary jurisdiction of the learned trial Magistrate.

In the case of *Co-operative Bank of Kenya -vs- Patrick Kangethe* (*supra*) the court did not hold that the ELC did not have jurisdiction to handle any matter involving land that was the subject of a charge. In the matter, the court of appeal took the view that where the dominant issue was one that involved dispute in the amount, accounts and /or the tabulation of the account, the High Court had jurisdiction and in the matter the High Court had properly entertained and dealt with the matter.

22. In my view considering that charges are regulated under both the Land Act, 2012 and the Land Registration Act, 2012 which provide for the appropriate court to deal with disputes concerning land falling under the said Acts, it would follow that the ELC as the designated court would have jurisdiction to deal with such disputes.

Section 150 Land Act provides: -

“The Environment and Land Court established in the Environment and Land Court Act and subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”

24. The Land Registration Act under section 101 provides for the court that has jurisdiction as follows:-

“The Environment and Land Court established by the Environment and Land Court Act, 2011 (No.19 of 2011) and subordinate courts, have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

25. The above provisions are clear and unambiguous as to the court that has jurisdiction to deal with disputes concerning land falling under the respective Acts. The ELC Act, 2011 was enacted by parliament pursuant to Article 162 (2) to provide for jurisdiction for the courts established thereunder. The ELC being a superior court with equal status as the High Court there would, in my view, be no basis to qualify a jurisdiction that had been expressly granted to it by statute as mandated by the constitution.

26. In the case of *Lydia Nyambura Mbugua -vs- Diamond Trust Bank Kenya Ltd & Another (2018) eKLR* Munyao, J commenting on the application of the above highlighted jurisdiction provisions in the Land Act and the Land Registration Act stated thus:-

“22. It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act, (formerly in the Registered Land Act now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of **Stephen Kibowen -vs- Agricultural Finance Corporation (2015) eKLR**). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the Land Act and Land Registration Act, and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.

27. I find Munyao, J’s observation persuasive and I agree with him. The constitution under Article 165 (5) ousts the High Court’s jurisdiction in matters where the ELC had jurisdiction as follows:-

“The High Court shall not have jurisdiction in respect of matters: -

a. Reserved for the exclusive jurisdiction of the supreme court under this constitution: - or

b. Falling within the jurisdiction of the courts contemplated in Article 162 (2).

28. The matter before the lower court related to the process through which the appellant sought to exercise its power of sale conferred under the charge. Although the issue of the variation of the rate of interest from 5 % to commercial rates was raised, the predominant issue was whether or not the due and legal process of enforcing the security had been followed. The subordinate court in my view having regard to the legal provisions on jurisdiction discussed above had jurisdiction to handle the matter. The preliminary objection was properly rejected and the appeal on this grounds fails.

29. Having come to the conclusion that the learned magistrate had jurisdiction to deal with the matter before her I now consider whether on that facts and material placed before her, she was justified to grant the order of temporary injunction that she did. The learned trial magistrate principally granted the injunction on the basis that the Respondent stood to suffer more harm than the appellant if the injunction was not granted. The trial magistrate found that in the circumstances the balance of convenience tilted in favour of the respondent.

30. The learned magistrate held that the appellant would suffer no harm if the injunction was granted since, the appellant would in the event it was successful in the suit, still be at liberty to exercise its statutory power of sale as the suit property was charged and remained as its security for the loan.

31. The guiding principles in granting temporary injunction were established in the case of *Giella -vs- Cassman Brown Co. Ltd 1973 EA 358* and were reaffirmed in the case of *James Njoro Kibutiri -vs- Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) eKLR*, as follows: -

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries -vs-Trufoods (1972) EA 420.”

32. The three principles as set out in the case are to be applied in a sequential manner meaning a party has to satisfy all the three conditions and failure to satisfy even one of them would disentitle, a party to the injunctive relief sought.

33. The Respondent to have been entitled to an order of injunction must firstly have demonstrated he had a *prima facie* case with a probability of success at the trial and, secondly, had to prove that he stood to suffer harm which could not be compensated in damages. The Court of Appeal in the case of *Mrao Ltd -Vs- First American Bank of Kenya Limited and 2 Others [2003] eKLR* held that a *prima facie* case is;

“a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”

34. The issue therefore for the court to determine in this appeal is whether the respondent satisfied the threshold for grant of a temporary injunction.

35. It is not in doubt that the Respondent was the registered owner of the suit property. Further it was not in doubt that the said property had been charged by the respondent to the Appellant and that the Respondent had defaulted in the repayment of the loan. As per the provisions of law, if the Respondent was in default in payment, then the Appellant had an obligation to ensure the provisions of the law were followed including the issuing of the 90 days demand notice, 40 day Notice of sale and the Redemption Notice as provided under the law. The Respondent averred that the Notices were not served upon him and that he only came to learn of the intended sale via the daily newspaper. If the Court was to find that the Notices were not properly served, then the Respondent’s rights would have been breached. The Appellant on its part averred that it complied with the relevant provisions of the law relating to issuance of the appropriate notices on the Respondent. The Respondent did not dispute that he charged the suit property to the Appellant but denied the appellant had served the requisite statutory notices before advertising the property for sale by public auction in exercise of its power of sale conferred under the charge. In order for the Court to make a determination on whether the Respondent’s rights had been infringed and determine if he had established a *prima facie* case, the Court will look at the procedures as set out in the Land Act and whether the same were complied with.

36. The Land Act provides that a chargee must first issue a notice under section 90 of the Land Act, when the chargor defaults in any of its obligations under the Charge. If the chargor does not comply with the demand within 90 days after service of the Notice, the chargee may proceed to realise the security through exercise of the power of sale conferred under the charge. In the present case, the Respondent disputed that he was served with the Statutory Notice under section 90 of the Land Act.

37. Section 96(1) and (2) of the Land Act, further provides that upon crystallization of the power of sale, the chargee is required to issue and serve on the chargor a 40-day notice to sell. The Section provides as follows:

96 (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 chargee 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 the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

38. As per the documents exhibited in the record of appeal, the Appellant issued to the Respondent the 3 months statutory Notice dated 11th November, 2019 which was served upon the Respondent via registered post. Before a charged property can be sold in exercise of the power

of sale a Notification of Sale under Rule 15 (d) of the Auctioneers Act is required to be given to the property owner. Rule 15 (d) provides as follows: -

15. Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property-

(d) Give in writing to the owner of the property a notice not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction.

39. It was the respondent's contention that he was not served with the requisite statutory, the redemption notice and/or the notification of sale by the Auctioneers. The appellant as per the record has exhibited a copy of the story notice dated 11th November 2019, a copy of the redemption notice dated 25th February 2020 and a copy of the Actioners notification of sale dated 5th August 2020. All these notices were served on the respondent by way of registered post save for the Notification of sale that was also personally served on the respondent by the Auctioneer as per the certificate dated 12th August 2020 issued pursuant to Section 15 (c) of the Auctioneers Rules 1997. The postage registration receipts in regard to the registered letters are exhibited that indicate the respondent was the addressee of the letter. The address shown on the letters/notices was P O Box 7451-30100 Eldoret which was the address the respondent gave as his address in the charge instrument.

40. In instances where the chargor alleges that the statutory notices were not served or were improper, the burden rests on the chargee to prove the same were served in accordance with the law.

In the case of *Moses Kibiego Yator -vs- Eco Bank Kenya Limited NKU E& L No. 426 of 2013 [2014] eKLR* the Court held that:-

“In instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargee, and that in the ordinary course of events, the notice must have reached the chargee.” [Emphasis mine].

41. The court has reviewed the material placed before the learned trial magistrate and notes that the issue of change of the applicable rate of interest on the loan advanced to the Respondent was provided for under clause 3.2 of the letter of offer and upon the Respondent leaving the employment of the Bank, the Bank notified the respondent that the interest rate would be varied to the prevailing commercial rate of interest with effect from 1st July 2019 vide the appellant's letter dated 9th May 2019. The Respondent endorsed his acceptance and acknowledgment of this letter on 27th May 2019. The appellant therefore through the said letter of 9th May 2019 satisfied the requirement to give the respondent notice of 30 days before varying the rate of interest on the loan. The court further notes that the respondent and the appellant after the issuance of the statutory notice entered into some negotiations where the respondent requested for the restructuring of the loan repayment and made payment proposals vide his letters dated 9th June 2020 and 23rd July 2020 which proposals the appellant found to be unacceptable. The appellant communicated its position vide its letter of 15th September 2020 which the Respondent duly acknowledged having received. The letter like the statutory notice, the redemption notice, and the notification of sale was sent to the respondent through the same address as was indicted in the instrument of charge.

42. The appellant in my view demonstrated that the requisite notices were issued to the respondent as provided under the law. The assertion by the respondent that he was not served with the statutory notice and the redemption notice on the face of the evidence presented before the learned trial is not believable. There were receipts for postage that were exhibited as evidence of posting of the notices and letters to the respondent and in the court's view that was sufficient proof that the respondent was served with the statutory notice and the redemption notice. The respondent at the time of charging the suit property was no doubt aware of the consequences in the event of default in servicing the loan facility. The appellant was entitled to exercise its statutory power of sale conferred under the charge provided the appropriate procedure was followed. In the court's view, and having regard to the material placed before the lower court, the appellant adhered to and followed due process in seeking to realise its security. In the circumstances the respondent did not establish he had a prima facie case with a probability of success.

43. The principles for grant of a temporary injunction are sequential such that if an applicant fails to demonstrate he has a *prima facie* case with a probability of success then the application must fail and there would be no necessity to consider the other two conditions relating to whether there would be irreparable damage suffered or the balance of convenience. On the evidence, I am satisfied the learned trial magistrate erred in the consideration and application of the principles for grant of a temporary injunction. The learned trial magistrate placed too much premium on who between the two parties stood to suffer greater harm and/or damage if the injunction was not granted. In my view that was a misdirection since the respondent had to satisfy the first condition, that he had a *prima facie* case before the court could consider whether, he could be adequately compensated by an award of damages if the injunction was not granted and he was successful at the trial.

44. As this court has held that the respondent did not prove or demonstrate he had a *prima facie* case with probability of success, the injunction granted in his favour by the lower court was not merited and the same is hereby set aside and vacated. In consequence the appeal is partially successful in that the court has upheld the learned trial magistrates order dismissing the preliminary objection and on the other hand has set aside the learned trial magistrate's order granting an injunction restraining the appellant from selling the suit property in exercise of its power of sale. The appeal is successful only to that limited extent.

45. Each party to bear their own costs of the appeal.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS DAY OF 4TH APRIL, 2022

J M MUTUNGI

JUDGE