



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Appeal 81 of 2000

Arising from Kericho P M's court Civil suit No. 256 of 2000

KENYA COMMERCIAL BANK.....APPELLANT

VS

DAVID KIPRONO RUTO.....RESPONDENT

J U D G M E N T

Kenya Commercial Bank Ltd, the appellant herein challenged on appeal the ruling of Robert Mochache, R.M. Kericho delivered on 6th September 2000 in which the subordinate court restrained the aforesaid bank from disposing, alienating or dealing in any way with L.R. No. KERICHO/KIPCHIMCHIM/2840. When this appeal came up for hearing the Respondent did not turn up despite having been served with a hearing notice. The appellant was however given the go ahead to proceed to argue the appeal ex parte.

On appeal, the appellant bank listed 4 grounds of appeal in its memorandum of appeal. Mr. Makokha argued grounds 1 and 3 together and grounds 2 and 4 together. I will set out the background of the dispute leading to this appeal before considering each of the aforesaid grounds of appeal.

The record shows that David Kiprono Ruto, the Respondent herein was employed by the appellant as a clerical staff vide a letter dated 5th April 1993 and posted to work as such to the appellant bank's branch Bungoma, as of 8th April 1993. It would appear while being an employee from the appellant he applied for financial facilities and was granted the same upon which he pledged his title number KERICHO/KIPCHIMCHIM/2840 as security. The amount advanced was to attract interest at a staff rate of 8% per annum payable by monthly instalments deductible from the Respondent's monthly salary.

The Respondent resigned from the employment of the appellant bank on 18th February 1998 and his resignation was acknowledged by the appellant bank on 10th March 1998. At the time of his resignation the Respondent's outstanding loan stood at Ksh.175,004/25.

On the 21st day of May 1998 the appellant bank wrote to the Respondent advising him that since he is no longer its employee the outstanding loan had been converted from staff loan to the Public section. This meant that the loan terms would obviously change.

The Respondent failed to repay the loan and this prompted the appellant bank to issue through its lawyers a three (3) months notice to the Respondent to repay the outstanding loan which stood at Ksh.194,790/= failure to which the appellant threatened to realize the securities.

These goings must have obviously taken the Respondent by surprise. Upon receiving these unkind news the Respondent filed a plaint before the principal magistrate's court at Kericho, in which he prayed an order of injunction to restrain the appellant from selling his land known as L.R. NO. KERICHO/KIPCHIMCHIM/2840. He also sought for costs of the suit. The appellant bank defended this

suit by filing a defence claiming that it had a right to exercise its statutory power, of sale under Section 74 of the Registered Land Act Cap. 300 Laws of Kenya because the Respondent had defaulted to settle the outstanding debt.

The Respondent managed to successfully secure temporary orders of injunction to restrain the appellant bank from exercising its statutory power of sale in a summons dated 28th April 2000. This is the order which has offended the appellant hence this appeal.

The appellant's counsel attacked the trial magistrate's decision to grant an order of injunction. He was of the view that the learned Resident Magistrate did not consider the laid down principles set out in the celebrated case of **GIELLA VS CASSMAN BROWN (1973) E.A. 358.**

The record indicates that the parties appeared before the learned Resident Magistrate to argue the summons interpartes. The summons was hotly contested by the appellant bank. It would appear that the Respondent accused the appellant bank of failing to use his pension to offset the outstanding debt. Of course the bank countered this argument by saying that the Respondent was not entitled to pension because he had not worked with the appellant for at least 5 years. The Respondent insisted that he is entitled to pension in view of the fact that he had worked for 5 years. He further accused the appellant bank of intentionally refusing to take into account his accumulated 42 days leave in order to deny him his pension.

The Respondent also complained that the appellant bank acted unilaterally when it converted the staff loan to Public Section thus fundamentally changing the terms of the loan agreement. The appellant bank opposed this argument by stating that once a staff member leaves the employment of the bank the outstanding debt ipso facto becomes converted into public section thus attracting interest at the prevailing market rates. The record shows that the learned Resident Magistrate took into account these arguments for and against the summons and came to the conclusion that the appellant should be restrained. It is obvious that he did not go into the details of the principles of injunction set out in ***GIELLA VS CASSMAN BROWN*** Supra.

As a first appellate court I am entitled to re-analyse, reconsider and re-evaluate the arguments or evidence which were adduced before the subordinate court and come up with my own conclusions. The principles of granting orders of injunction are well settled. First, an applicant must show that he has a prima facie case with a probability of success. Secondly, an applicant must show that he is likely to suffer an irreparable loss and finally that when the court is in doubt it would decide the application on a balance of probabilities.

In this matter the trial magistrate was of the view that these principles were met by the Respondent. The Respondent had complained that he was not consulted by the bank when converting the staff loan to public section. He also complained that the bank unjustifiably denied him pension when it did not consider his accumulated 42 days leave to make his tenure of employment with the appellant bank 5 years. In view of these issues I am convinced that the Respondent had shown a prima facie case with a probability of success.

It is not denied that the appellant bank issued notice through its advocate in a letter dated 16th April 1999 giving the Respondent 3 months from the date of the notice to pay the debt. This notice is annexed to the supporting affidavit of the Respondent as annexure no "D.K.R. 9". In my view this notice is fatally defective in that it does not comply with the provisions of section 74 (1) of the Registered Land Act which mandates charges to issue notices of 3 months from the date of service before exercising its statutory power of sale. This goes to show that Respondent had shown that he had a prima facie case with a probability of success before the trial court. In the circumstances of this case it is obvious that the Respondent would suffer irreparable loss unless the appellant bank is restrained.

The upshot therefore is that the Resident Magistrate decision cannot be faulted. Though he did not critically analyse the issues argued before him, nevertheless he arrived at the correct decision. Consequently the appellant's grounds 1 and 3 are dismissed.

The final ground of appeal argued by Mr. Makokha is to the effect that the trial court did not appreciate the fact that the statutory power of sale vested in the appellant had arisen. I think I have already dealt with this ground. I will restate that the notice issued by the appellant in which a copy has been annexed to the affidavit of the Respondent does not comply with the provisions of S. 74 (1) of the Registered Land Act. It is in my considered view that the statutory power of sale therefore had not crystallised. In the end I find this ground lacking in merit.

In view of the above findings, this appeal is ordered dismissed with no order as to costs. The Deputy Registrar is directed to forward the subordinate court's file to Kericho Principal Magistrate's court so that the suit may be heard and determined expeditiously by that court.

DATED AND DELIVERED THIS 13th DAY OF May 2005

J.K. SERGON

JUDGE