

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Civil Appeal 27 of 2002

Arising From original Busia SRM Civil case no.729 of 1996

JOHN KATAMBALA NALWENGE APPELLANT

VS

NATIONAL BANK OF KENYA LTD RESPONDENT

JUDGMENT

In a plaint dated 14TH October 1996, John Katambala Nalwenge, the appellant herein, sued National Bank of Kenya Ltd., the Respondent herein before the Senior Resident Magistrate's Court at Busia in which he claimed for interalia: an order compelling the Respondent to discharge the charge over L.R.NO.BUKHAYO/MATAYOS/786 and for a further order directing the Respondent to hand over the title deed to the appellant.

The Respondent resisted the appellant's claim by duly filing a defence. The suit was finally heard whereby the action was dismissed on the ground that the appellant had not proved his claim on a balance of probabilities against the bank. Being unhappy with the aforesaid decision the appellant filed this appeal. In a memorandum of Appeal dated 15th November 2002, the appellant listed 12 grounds of Appeal. When this appeal came up for hearing Mr. Balongo, the appellant's counsel chose to argue two main grounds. First, that the appellant was not bound to enjoin the A.G or one Anindo Makokha Afuma as party to the suit. The learned advocate further argued that his failure to enjoin the aforesaid parties was not fatal. On his part Mr. Ipapu who appeared for the respondent opposed this ground by stating that the appellant had no locus standi to sue the Respondent.

The record shows that the appellant had sued the appellant in a plaint dated 14th October 1996.

The appellant made the following allegations in paragraphs 3 and 4 of the plaint.

"3. Land Parcel NO.BUKHAYO/MATAYOS/786 was originally registered in the names of Isaiah Nalwenge but Anindo Afuma Makokha fraudulently registered in his name.

4. That when the fraud was discovered, the plaintiff and Anindo Afuma Makokha applied to Nambale Land Control Board to obtain consent of the board to transfer the suit land stated in paragraph 3 above to the plaintiff."

It is imperative to note that when this suit came up for hearing, the appellant was the only witness who testified before the learned Senior Resident magistrate. In his evidence in chief, the appellant stated that one Anindo Afuma Makokha who was his clansman caused himself to be registered as the proprietor of L.R.NO.BUKHAYO/MATAYOS/786 while he knew that the same was the appellant's share. He told the trial magistrate that he lodged a complaint before the elders who then arbitrated over the dispute which culminated to Anindo Makokha Afuma agreeing to execute transfer documents and to appear before the Nambale land Control Board. The appellant said that he was unable to effect the transfer of the suit premises because Anindo Makokha Afuma had pledged the title to the land in dispute to secure a loan in 1978.

The appellant produced the duly executed forms for the application for the Land Board consent, the transfer and the consent in evidence. When the appellant hit a snag, he sued the bank. After considering the appellant's evidence and the submissions tendered by the appellant's advocate and the advocate for the bank, the learned Senior Resident Magistrate dismissed the action.

It is evidently clear that the appellant only adduced evidence which were against one Aninda Makokha Afuma. There was no single evidence which went against the Respondent. I am satisfied that the trial Senior Resident magistrate appreciated and understood the evidence adduced before him. He came to the correct decision that the appellant had not proved his case against the Respondent. I agree with the submissions of Mr. Balongo for the appellant that non-joinder of a party to a suit is not fatal. However it was incumbent upon his client, the appellant herein, to tender evidence proving the case against the Respondent on a balance of probabilities. In this matter the appellant miserably failed to discharge that burden.

The second ground of appeal argued by Mr. Balongo for the appellant is that the Bank lost its right to claim the debt over the charge registered against L.R.NO.BUKHAYO/MATAYOS/786 because the charge did not contain the legal date of redemption. On this issue, I agree with the submissions of Mr. Ipapu for the Respondent that the appellant had no locus standi to challenge the legality of the charge over the title in dispute because the appellant has no privity of contract over a loan agreement between the Respondent and his nemesis Anindo Makokha Afuma.

In the end and for the foregoing reasons this appeal must fail. The same is dismissed in its entirety with costs to the Respondent.

Dated and delivered this 3rd day of November 2005.

J. K. SERGON

JUDGE

Read in the presence of Ipapu holding brief for Mr. Manwari for the Respondent. NA for the appellant.