



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E023 OF 2021

KEY MICROFINANCE BANK LTD.....1ST APPELLANT

WATTS AUCTIONS.....2ND APPELLANT

VERSUS

FRANKLINE BUNDI MURIITHI.....1ST RESPONDENT

PENINAH MAKANDI.....2ND RESPONDENT

LYDIA KARIMI.....3RD RESPONDENT

PHINEAS MWENDA MURIITHI.....4TH RESPONDENT

(Being an appeal from the Judgment of Hon. S. Ndegwa (P.M.)

delivered on 1st December, 2020, in Githongo PM ELC E004 OF 2020)

JUDGMENT

1. The appellants seek to overturn the order made by the lower court dismissing the preliminary objection dated 28.9.2020 and allowing the respondents application for injunction on the basis that: the respondent had no locus standi to institute the suit; no cause of action had been disclosed; customary trust could only be raised against a registered proprietor and not a lender; the applicants had not satisfied principle for grant of an injunction; the court was biased; the court allowed submissions from the bar based on unpleaded issues.
2. This being a first appeal the court is mandated to re-assess and re-appraise itself with the lower court proceedings and come up with its own findings and conclusion so as to establish if the trial court based its findings on facts and the law.
3. The respondent (as children of one Samuel Mureithi Magambo) deceased and registered owner of **Parcel No. L.R No. Abothuguchi/Katheri/4882** based on intergenerational equity sued the 2nd appellant for charging the aforesaid land and obtaining **Kshs. 500,000/=** from the 1st appellant and in breach of their overriding rights and paying to clear the loan facility subsequent to which the 1st appellant caused the property to be advertised for auction sale for recovery of the loan.
4. Alongside the plaint, the respondents brought a notice of motion seeking for temporary orders of injunction restraining the appellants from selling or disposing the suit land pending hearing of the suit alleging they came to know of the loan after their father passed on 31.3.2020 and when the 2nd appellant advertised it for auction sale on account of loan arrears, yet they had intergenerational equitable rights as their only homestead and inheritance.
5. Interim orders were issued with interpartes hearing on **28.9.2020**. The appellants entered appearance and by a replying affidavit sworn on **25.9.2020**, they stated the deceased took a loan of **Kshs. 500,000/=** and offered the suit land as security, a charge was registered, a search established there were no encumbrances, the deceased fell into monthly instalment loan arrears of **Kshs. 29,584/=**, notices were sent over this default, a three months statutory notice was issued dated **17.6.2019**, thereafter a 40 days' notice of intention to sell was made after which a 45 days redemption notice and notification of sale was made.
6. Further the appellants averred, in compliance with the law, a pre-auction valuation report was done after which advertisement for auction was made through newspapers for **24.1.2020**. Similarly the appellants alleged the deceased had previously filed **Meru CMCC No. 11 of**

2020 contesting the sale but withdrew the suit, and that since notices had been given during the lifetime of the deceased, there was no need to re-issue fresh statutory notices for the second time.

7. Additionally the appellants stated the respondents had no documents to legally represent the estate of the deceased, could not demonstrate any relationship or trust between themselves and the 1st appellant who had a valid charge over the suit land, lacked any privity of contract with the 1st appellant, had no locus standi, were malicious and mischievous hence urged the suit be struck out with costs.

8. The appellants attached a copy of the title deed, a letter of offer, a copy of a charge, copy of search notice, notification of sale, valuation report, newspaper advertisement and pleadings in the CMCC case marked as **RK1 – 8 (a)** respectively.

9. The appellants also filed a notice of preliminary objection dated 28.9.2019 claiming the plaintiffs lacked locus standi to institute the suit and secondly that the suit offended **Order 2 rule 15**.

10. Instead of filing a defence and counterclaim, the appellants filed a further list of documents dated **22.10.2020** which included a statement of defence filed in **Meru CMCC ELC No. 11 of 2020**.

11. The trial court considered both the applications and the preliminary objection dated **28.9.2020**, in which in a ruling read on **1.12.2020** dismissed the preliminary objection and proceeded to allow the application for temporary injunction.

12. On the part of the appellant, it is submitted a customary claim can only be sustained against a registered proprietor and not a lender as per *Isack Kieba M'Inanga –vs- Isaaya Theuri M'Lintari [2018] eKLR* ruling; the court **Under Order 2 rule 5** should have found no cause of action disclosed and that the respondents had not satisfied conditions in *Mrao Ltd. –vs- First American Bank of Kenya & 2 Others [2003] eKLR*, that tangible evidence of trust ought to have been availed as held in *Paul Kirinya –vs- Delfina Kathiri [2019] eKLR*, that the consent of respondents was not required by the deceased to seek a loan as held in *Jemutai Tanui –vs- Juliana Jeptepkeny & 5 Others [2013] eKLR*; that land had become a commodity for sale as held in *Elijah Kipng'eno Arap Bii –vs- Kenya Commercial Bank Ltd [2001] eKLR*, that the court should not have allowed the respondent to submit on the issue of insurance without pleading it as held in *Raila Amolo Odinga & Another –vs- IEBC & 2 Others [2017] eKLR*.

13. On the other hand, the respondents submit they had locus standi as beneficiaries with overriding rights under **Section 28 (b) of Land Reform Act** this being family land hence rely on *Alfred Njau & 5 Others –vs- City Council of Nairobi [1983] eKLR* on the proposition that as beneficial interested parties they had rights under the law to bring the suit on their own, and not as representatives of the estate.

14. As regards the threshold for issuance of injunctive orders, the respondents submit, there was a threat to wrongly sell the suit land in total disregard of their overriding rights hence the trial court rightfully found they had established a prima facie case with a probability of success, had shown irreparable loss if their only homestead was auctioned which would not be compensated by way of damages and lastly the balance of convenience favoured them in granting the orders.

ANALYSIS AND FINDINGS

15. The appellants blame the trial court for entertaining the suit when the respondents lacked capacity to institute the suit over the suit land without requisite letters of administration on behalf of the estate of the deceased, through whom the 1st appellant had a privity of contract with.

16. In *Ragui –vs- Barclays Bank of Kenya Ltd [2002] eKLR 647* the court held that when a chargor dies before a chargee has served upon him the statutory notice of sale, the chargee cannot purport to serve the same upon a deceased person. He has to serve it upon the executor or administrator of the estate of the chargor.

17. **Section 28** of the **Land Registration Act 2012** provides a registered land shall be subject to trusts including customary trust which need not be noted in the register.

18. In *Mumo –vs- Makau (2002) 1EA 170*, the court stated a trust was a question of fact to be proved through evidence and that under **Sections 107 and 108** of the **Evidence Act**, the burden lies with the person asserting a fact to prove them.

19. Given the foregoing, it is evident the issue of trust raised by the respondents could only be proved through **viva voce** evidence which the court could not possibly determine through a preliminary objection.

20. The appellants filed no defence and or counterclaim denying the facts as pleaded by the respondents. In absence of a defence, the trial court in my considered view was right to hold that there was need to have the matter heard on merits so that the respondents could prove their claim.

21. In *Susan Mumbi Waititu –vs- Mukuru Nduta & 4 Others [2007] eKLR* the court held parties have to prove with cogent evidence that the suit premises was ancestral land and thus family land, passed over through the ages.

22. Secondly, the appellants have submitted the trial court allowed submissions over unpleaded issue of the mortgage protection cover. The replying affidavit sworn by **Rebecca Kamau** attached annexure **marked RH 2(a)**. At page 10 thereof, the offer talks of a credit life insurance. This formed part of the court proceedings. It was therefore perfectly within the respondents rights to submit on the issue. The deceased signed the loan proposal form and the credit protection cover became automatic the moment the loan was approved.

23. It is common knowledge such a policy crystalizes on the happening of death of an insured as held in *Ann N. Parmena –vs- Housing Finance Co. of Kenya Ltd. [2015] eKLR.*

24. The 1st appellant did not notify the family as to what became of the loan protection cover upon the demise and the outstanding loan and if it had frozen the interest, as held in *Housing Finance Company Ltd. –vs- Mary Wambui Muturi [2018] eKLR.*

25. Given the issues raised in the plaint and there being no defence, to counter the claims over trust, my considered view is that the trial court was right to find the respondents to have established legal rights under **Section 28 of the Land Registration Act, Article 40 of the Constitution** and **Order 40 of the Civil Procedure Rules** which as held in *Mrao Ltd –vs- First American Bank Ltd* called for rebuttal from the other appellants to respond. The court guided by **Section 1A, 1B & Article 159** of the **Constitution** sought to preserve the property pending the hearing and determination of the suit.

26. In the premises my finding is the appeal herein lacks merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

Mr. Appollo holding brief for Kimaita for appellant

Kithinji for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE