



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA NO 21 OF 2017

ISAAC MWANGI.....1ST APPELLANT

ANNE NJERI MWANGI.....2ND APPELLANT

VS

MOLYN CREDIT LIMITED.....1ST RESPONDENT

BENSURE AUCTIONEERS.....2ND RESPONDENT

SWALLEH SAKWA MOHAMED..... 3RD RESPONDENT

DISTRICT LANDS REGISTRAR.....4TH RESPONDENT

(Appeal from the order in the Ruling of Honourable G Omodho Senior Resident Magistrate

delivered on the 29/11/2017 in CMCC No 820 of 2013 - Thika)

RULING

1. This appeal relates to two notices of motion dated the 27/2/17 and the 14/3/17 filed by the 1st Appellant/Plaintiff then in the lower Court.
2. With respect to the Notice of Motion dated the 27/2/17, the Plaintiff sought the following orders;
 - a. That this matter be certified as urgent and be heard ex-parte in the first instance.
 - b. That Bensure Auctioneers be enjoined as Interested Party.
 - c. That the Interested Party be restrained from auctioning the household goods described in their proclamation notice dated 16th February, 2017.
 - d. That the instructions by the Defendant/Respondent to the Interested Party on 08/02/2017 instructing the latter to distress the Plaintiff/Applicant household goods to recover the former rent arrears and auctioneers charges be declared to be in contempt of Court being that the matter is due for hearing on 03/03/2017.
3. Shortly thereafter the Plaintiff filed the second application dated the 14/3/2017 seeking the following orders;
 - a. That this matter be certified urgent to be heard ex parte in the first instance and interpartes on 03/04/2017.
 - b. That Swalleh Sakwa Mohamed be enjoined as 2nd Interested Party.
 - c. That District Lands Registrar, Thika be enjoined as 3rd Interested Party.
 - d. That the 1st Interested Party be restrained from auctioning the household goods described in the proclamation notice

dated 16/02/2007.

e. That the instructions by the 2nd Interested Party to the 1st Interested Party on 08/02/2017 instructing the latter to distress the Plaintiff/Applicant rent arrears and auctioneers charges be declared to be unlawful and in bad faith.

f. That the Defendant be made to deposit the title deed to the suit property which was in the name of the Plaintiff and which was in their custody on trust at the time of the filing of this suit or explain how they sold the suit property to the 2ND Interested Party when the matter was still pending in Court.

g. That if the Defendant is found to have unlawfully sold the suit property while the matter was pending in Court, the Defendant be found to be in contempt of this Honourable Court.

h. That the purported purchase of the suit property by the 2nd Interested Party at a public auction be declared unlawful and the Defendant be compelled to refund the sale price to the 2nd Interested Party who is said to be the registered owner of the suit property.

i. That the 2nd Interested Party be ordered to deposit the title deed number JUJA/KALIMONI BLOCK 8/462 in Court.

j. That the 3rd Interested Party be restrained from allowing any dealings in the suit property until the hearing and determination of this suit.

k. That the 1st Interested Party be found to have colluded with the Respondent and perjured in his affidavit dated 10/03/2017 in claiming that his proclamation notice dated 16/02/2017 with instructions from the Respondent was a forgery.

l. That leave be granted to serve the 2nd Interested Party by Registered Mail.

m. That the cost of this suit Application and exemplary damages be provided for.

n. That the hearing of the main suit be stayed pending the hearing and determination of this application as the hearing of the main application will otherwise be futile.

o. That due to the circumstances, this file be kept in safe custody.

4. On the 29/11/2017 the Learned Magistrate dismissed the application dated the 27/2/17 and allowed the one of 14/3/17 in part as follows:-

a. The application dated the 27/1/2017 is dismissed with costs

b. Swalleh Sakwa Mohammed be and is hereby enjoined as the 2nd Interested party

c. Leave be hereby granted to serve the 2nd Interested party by registered mail

d. That this file be kept in safe custody

e. That each party to bear its own cost for the application dated the 14/3/2017.

5. Aggrieved by the said decision the Plaintiff filed an appeal and proffered 7 grounds of appeal as follows;

1) That the Learned Trial Magistrate erred both in fact and in law when she failed to find that the purported action of the suit property was unlawful for going against the spousal rights of the 2nd Appellant who had given consent to charge the property but who was not served with the notice to sell by the 1st Respondent, thus violating her spousal rights contrary to the Land Act Section 96(3) (c) and the Land Registration Act Section 28(a) and 93(2).

2) That the Learned Trial Magistrate erred both in fact and in law when she failed to appreciate that the whole of the principal sum owed by the 1st Appellant to the 1st Respondent had been paid in full and in excess, and that only the matter of interest was pending and which could not be resolved due to the failure by the 1st Respondent to provide full disclosure relating to contract documents and loan statements.

3) That the Learned Trial Magistrate erred both in fact and in law when she held that the 1st Respondent was not in contempt of Court and that interim orders issued on 14/10/2013 restraining interference with the suit property had expired, when those orders had not been discharged and the Hon. B. J. Bartoo (RM) had pronounced herself on the matter as obiter dictum and as is clear on the face of it.

4) That the Learned Trial Magistrate erred in fact when she did not address herself to the concealing of the sale of the suit property from the Court and the Appellants.

5) That the Learned Trial Magistrate erred both in fact and in law when she failed to find that the purported auction of the suit property was unlawful for the reason that that the 1st Respondent contravened Sections 97(1), (2), (3) and (7) of the Land Act.

6) That the Learned Trial Magistrate erred both in fact and in law when she ruled that the sale of the suit property having been concluded, no reliefs were available to the 1st Appellant, yet Section 26(1) of the Land Registration Act and Section 13(7) of the ELC Act empower Courts to grant such Orders as were sought over fraudulently acquired titles.

7) That the Learned Trial Magistrate erred in fact and in law when she ruled that the 1st Appellant was at liberty to pursue orders to restrain the 3rd Respondent from auctioning of his household goods, yet this very prayer had already been made against that party as prayer No. 5 in the application dated 14/3/2017.

6. Consequently, the Appellants sought the following orders:

a. The 1st Appellant's application dated 17/2/2017 and 14/3/2017 in Thika Chief Magistrate's Court Civil Case No. 820/2013 be wholly allowed.

b. Costs for this Appeal be awarded to the Appellants.

7. In their submissions the Appellants submitted that the ruling of the Learned Hon Magistrate failed to protect their interests and left them exposed to losing their matrimonial home. Prayer No 7 was granted by the Court on the 4/12/2019 hence the abandonment by the Appellants.

8. With respect to grounds 1, 2, 4, 5 and 6 of the Memorandum of Appeal the Appellants submitted that the Court having allowed additional affidavit evidence of the alleged fraud and the Respondents failing to give any rebuttal, the same remains unchallenged and urged the Court to exercise its original jurisdiction and determine the matter in their favour and find fraud on the part of the Respondents in the manner in which the property was auctioned. That in any event the particulars of fraud were well articulated in the application dated the 3/7/2020 which particulars were not controverted by the Respondents.

9. In the main the Appellants faulted the alleged sale of the suit land on grounds inter alia that; failing to issue valid notices under Section 90 and 96(2) of the Land Act; failing to issue notice to the 2nd Appellant being a spouse who gave consent to the charge; using an outdated 5 year old valuation for the forced valuation; selling the property at an undervaluation below the legal limit of the open market price; refusing to supply complete charge documents together with loan statements ; selling the property in defiance of Court orders and while litigation was pending; charging exaggerated illegal oppressive and unconscionable interests and charges on the loan amount.

10. Relying on Section 26 of the Land Registration Act, Sections 90, 96 and 97 the Land Act, Section 44A of the Banking Law, Section 13 & 20 of the Consumer Protection Act, Section 56 of the Competition Act and Section 13(7) of the ELC Act inter alia, the Appellants urged the Court to nullify the title now registered in the name of the 3rd Respondent.

11. With respect to ground No 3 – disobedience of the Court orders issued on the 14/3/2017, the Appellants submitted that the alleged auction of the property was carried out during the pendency of valid Court orders which orders had been brought to the attention and knowledge of the 1st Respondent as demonstrated by the signature acknowledging receipt by the Chief Executive of the 1st Respondent. In their opinion the said orders prohibited any interference with the suit property pending the hearing and determination of the suit.

12. Relying on the case of **Mugo Muriu Investments Limited Vs E W & 2 others (2017) eKLR; Re Estate of Solomon Muchiri Macharia (2016) eKLR ; Rajinder Singh & Others Vs Santa Singh & Others**, the Appellants submitted that a transfer of property during the pendency of the suit is prohibited except with the leave of the Court. Inter alia, the Appellants argued that in addition to the subsisting interlocutory injunctive orders, the Respondents could not have conveyed a valid title while the subject matter remained under litigation and in violation of the common law doctrine of *Lis pendens*. They faulted the Learned Hon Magistrate for overlooking this violation and failing to hold the 1st Respondent in contempt of Court.

13. Further that the participation of the 3rd Respondent in the fraudulent disposal of the suit land cannot avail him the defence of an innocent purchaser.

14. In conclusion the Appellants urged the Court to find and hold as follows; Set aside the Ruling of the Learned Trial Magistrate on the applications dated 17th February 2017 and 14th March 2017; declare that the sale and transfer of the suit property as fraudulent, null and void; declare that the sale and transfer of the suit property during the pendency of litigation was against the doctrine of *lis pendens* hence unlawful; nullify the fraudulent certificate of title issued to the 3rd Respondent, restore the title to the 1st Appellant; order the District Land Registrar, Thika, to make the necessary changes to the register, declare that the charges for the loan demanded by the 1st Respondent are oppressive and unconscionable; determine the amount of interest, if any, that may be due to the 1st Respondent; and award costs of the suit to the Appellants.

15. Despite service the 2nd - 4th Respondents failed to file their written submissions for or against the appeal.

16. The appeal is contested by the 1st Respondent. In its written submissions filed on the 18/10/2021 by the law firm of **Muchoki Kangata Njenga & Co Advocates**, the 1st Respondent faulted the Appellants by introducing new evidence to the suit through the appeal. That for starters the Appellants did not plead fraud in their suit found at page 277 of the Record of Appeal. That the supplementary record of appeal in itself is an attempt to mend the suit by way of introducing new issues. That the appeal being against the dismissal of the two applications and

the Court in its own wisdom having allowed the admission of the new evidence, it opined that the same remains immaterial to the appeal.

17. The 1st Respondent relied on the case of **Wanje Vs A K Saikwa (1984) eKLR** where the Court held inter alia that..... the appellate Court must find the evidence needful. Additional evidence should not be admitted to enable the Plaintiff make out a fresh case in appeal. There would be no end to litigation if the rule were to be used for the purpose of allowing the parties to make out fresh case or to improve their case by calling further evidence.

18. That the Appellants are seeking to amend their suit through the appeal a position that is legally untenable.

19. Further the 1st Respondent submitted that some of the evidence was obtained in contravention of the Data Protection Act No 24 thus its admissibility is in question.

20. That the supplementary affidavit on page 28 of the Supplementary record of appeal does not show the authority of his co- Appellant to swear the said affidavit and urged the Court to expunge the same.

21. The 1st Respondent submitted that grounds 1, 2, 4, 5 & 6 of the memorandum of appeal have no basis as they are not supported by the plaint filed by the Appellants on record. That in addition, these prayers amount to orders of mandatory injunction being sought at interlocutory stage and that the Learned Hon Magistrate was right not to delve into the substantive issues as the suit was yet to be heard. In the end the 1st Respondent argued that it was not possible for the Court to conclusively determine at the interlocutory stage the issues raised by the Appellants which issues require a full hearing.

22. On ground No 3, the 1st Respondent submitted that there were no subsisting orders stopping the sale of the property. That the orders granted on the 14/10/2013 were interim orders pending the hearing and determination of the application inter partes. That these orders were extended last on the 23/5/2014 and no such extension was granted thereafter. That the Appellants failed to extend the said orders on the 8/5/15 and so the same lapsed. See **Solomon Kinoti & Anor Vs Hon AG (2011); Jenipher Achieng Auko & 13 others Vs University of Nairobi (2019)EKLR** where the Court held that where interim orders are not extended they lapse and cease to be valid for any meaningful enforcement.

23. The key issues for determination are;

a. Whether the Learned Hon Magistrate erred in not determining grounds 1, 2, 4, 5, and 6 in favour of the Appellants.

b. Whether the 1st Respondent should be held in contempt of the Court orders issued on the 14/10/13.

c. Who meets the costs of the appeal.

24. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated as thus:

"....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 nor heard the witnesses and should make due allowance in this respect..."

25. The origin of this appeal is the CMCC No 820 of 2013 – **Isaac Mwangi Vs Moly Credit Limited & Recovery Concepts Auctioneers**. In the main, the Plaintiff/Appellant sought the following orders; a temporary injunction restraining the defendants, agents, servants from claiming interest from auctioneering trespassing interfering with the Plaintiffs quiet possession of the suit land; release of the copies of contract agreement documents and the charge to the Plaintiff by the 1st Defendant.

26. The subject matter of the suit is JUJA/KALIMONI/BLOCK8/462 (suit land). It is the Plaintiffs case that he was afforded certain loan facilities by the 1st Respondent in form of three cumulative loans between the years 2011 – 2012 totaling Kshs 1,500,000/-. The loan was secured by the suit land as collateral.

27. Simultaneously the Plaintiff moved the Court by way of notice of motion seeking certain interim orders. The Court was not availed the particular application on record for its perusal. But suffice to state that the impugned orders are on record and are fashioned as;

“ It is ordered that;

a. The application be and is hereby certified as urgent.

b. A temporary a temporary injunction be and is hereby issued restraining the Defendants / Respondents by themselves, their agents, their savants, anybody claiming interest or their employees or otherwise jointly and severally from advertising, auctioneering, trespassing, alienating, interfering, or hindering the Plaintiff’s family lands known as Juja/Kalimoni Block 8/462 – Kiambu County in any manner that may restrict, diminish or interfere with the Plaintiff’s/Applicant’s and family stay on the said parcel of land pending hearing and determination of this suit.

c. That Hearing Notice to issue for interparte hearing on 25/10/2013.”

28. I have perused the record on page 8 – 30 of the Record of appeal and note that though the orders are worded “pending the hearing and determination of the suit”, the Court further set the interpartes hearing for the 25/10/13. There is no indication that the matter was heard on the 25/10/23 but on the 15/11/13 the said orders were extended to the 17/1/2014, 21/2/14, 28/4/14, up to 23/5/14. Thereafter the matter of extension of orders went silent during the Court attendances on 23/5/14, 8/5/15, 20/5/15 and 22/4/16. On the 22/4/16 another application is introduced dated the 8/3/16. This is the application brought by the 1st Defendant /Respondent seeking dismissal of the suit.

29. According to the record the parties appear to be discussing an out of Court settlement. On the 28/10/16 the 1st Appellants counsel on record then informed the Court that the full principal amount had been paid in full and that what was pending was the interest. The resolution of the amount of interest was pending the production of copies of the contract/charge by the 1st Respondent.

30. It is interesting that as the Court is being informed of an out of Court settlement, going by pages 61 and 62 of the Supplementary Record of appeal, the suit land is allegedly being sold by public auction on the 23/3/2016! This fact was not disclosed to the Court by the Respondents who were duly represented by Counsel on record.

31. That said, the relevant issue for determination is whether indeed on the said 23/3/16 there existed orders barring the sale and disposal of the suit land. Regrettably there were none. The orders lapsed on the 23/5/14, about 2 years before the alleged sale and auction of the suit land.

32. The necessary factors to consider in a matter relating to contempt of Court are;

a) Whether there was an order made by the Court which was clear and unambiguous.

b) Whether the party alleged to be in contempt of Court was aware of the Court order.

c) Whether the party alleged to have acted in contempt indeed acted in a manner contra to the order issued by the Court.

33. Going by the finding of the Court at para 28-31 above, it becomes evident that the said orders had lapsed and cannot found grounds for contempt of Court.

34. That said it is not lost that the suit land was disposed while the suit was pending. Courts in this country have frowned and meted out sanctions in the event where a party is said to have gone against the common law doctrine of Lis Pendens which prohibits dealings with the suit land during the period of active litigation of the suit. **See the case of Re Estate of Solomon Muchiri Macharia (2016) eKLR.** The 1st Respondent has not exhibited any leave granted by the Court to dispose of the suit land during the pendency of the suit. In my considered view this is a serious matter that cannot be determined in this appeal but in the main suit and the Court must exercise restraint so as not to prejudge the pending suit in the lower Court.

35. Suffice to say that this ground is rejected for the foregoing reasons. That answers issue No 2.

36. I will now deal with issue No 1. This issue encompasses grounds Nos. 1, 2, 4, 5 and 6 of the memorandum of appeal. The issues that arise from these grounds have been summarized in paragraph 9 of the Ruling. The Appellants aver that the suit land was allegedly auctioned in unclear circumstances that are mired with illegalities and fraudulent acts of the Respondents. In the opinion of the Appellants this Court should proceed to determine the suit based on the affidavit evidence tendered by the Appellants. In their view the same have not been rebutted by the Respondents despite service.

37. To satisfy this quest the Appellants have urged the Court to determine the suit as per their orders set out in Para 14 of this Ruling.

38. In the case of **Cecil & Miller t/a Miller & Company Advocates –vs- Partin Shariff & 3 Others [2012]eKLR** where Justice Odunga held as follows:-

“However, it is trite that as a matter of good practice and prudence all matters ought to be filed at the lowest competent adjudicating body which can deal with issues in dispute. This practice is founded on the fact that a party should be given as much latitude as the law permits in challenging a decision. To deal with the matter at the higher echelons of judicial hierarchy, even if the higher court is clothed with jurisdiction may amount to denying a party the opportunity to object to the decision. In this case, if the High Court were to accommodate the said application, the opportunity to object to the decision which is available of the decision is made by the Deputy Registrar would be lost....Accordingly while not acceding to the objection raised, I, however decline to entertain the application and instead direct that the same be heard and determined by the Deputy Registrar under the provisions of paragraph 13A of the Advocates Remuneration Order.”

39. Let me make it clear that this appeal is on the decision of the Learned Magistrate delivered on the 29/11/17 which decision arose from the Appellants notices of motion dated the 14/3/17 and the 27/2/17. Evidently the issues raised in para 9 and 14 of this ruling are issues that go to the root of the substantive suit and cannot be determined on an interlocutory basis nor by the Appellate Court.

40. For example the issues of illegality and fraud as alluded by the Appellants must be subjected to a hearing so that the evidence can be tested and the Court may weigh the evidence of the parties to arrive at a just end. The Constitution of Kenya at Art 40 (6) states that a title that is unlawfully acquired is not protected by the Constitution. For a Court to arrive at that determination, the impugned title must be taken through the due process of the law for the Court to determine its legality or otherwise.

41. The former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” See also the case of Koinange & 13 others v Koinange [1968] KLR 23

42. Fraud being a serious allegation must procedurally be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The Court cannot infer fraud from the Pleadings. It must be pleaded in a particularized manner and proven by leading evidence. See **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**.

43. I have perused the Plaintiff of the Appellants and as set out in para 24 of this ruling and going by the prayers in the plaintiff, it would appear that the suit was spent on granting of the interim orders on the 14/3/2013. I say so because I have not seen any amendment of the said pleading on record. Either way the Appellants’ prayers alluded to earlier did not include the prayers that this Court or the lower Court were urged to determine. It is the law that parties are bound by their pleadings. A party cannot digress from his pleadings midair and urge what has not been pleaded. In the case of **Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd (2018)eKLR** the Judge held:-

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”

44. The second reason why these grounds must fail is because the Appellants have not pleaded for an order of mandatory injunction in the prayers in the notices of motion in the lower Court.

45. The Court finds no reason to fault the learned Hon Magistrate in declining the prayers.

46. With respect to the prayer for restraining the proclamation of the goods of the Plaintiffs and for avoidance of doubt, the Court notes that there is already a huge cloud of doubt on how the suit land was disposed and guided by Order 40 Rule 1 of the Civil Procedure Rules the Court orders status quo and restrains the Respondents from interfering with the quiet and peaceful possession of the suit property pending the hearing and determination of the suit in the lower Court.

47. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 18TH DAY OF NOVEMBER 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

1st Appellant in person

Isaac Mwangi acting on behalf of 2nd Appellant

Ms Kihara holding brief for Musyoki for 1st Respondent

2nd, 3rd and 4th Respondents – absent