



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 6 OF 2020

JEREMIAH M. SAGWE.....APPELLANT

VERSUS

KENYA INDUSTRIAL ESTATES.....RESPONDENT

{Being an appeal against the Ruling of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 7th day of June 2019 in the original Nyamira Chief Magistrate’s Court Civil Case No. 185 of 2017}

JUDGEMENT

Sometimes in the year 2015 the appellant borrowed and was advanced a sum of Kshs. 400,000/= by the respondent over a charge of his parcel of land LR No. West Mugirango/Siamani/7368. He was to repay the loan over a period of two years. The appellant however defaulted and the respondent in an effort to exercise its statutory power of sale instructed Nyaluonyo Auctioneers to auction the charged property. Pursuant to those instructions Nyaluonyo Auctioneers wrote a letter dated 12th May, 2017 to the appellant and gave him forty-five (45) days to redeem the property by paying the creditor a sum of Kshs. 397,868/= and informed him that the sum would continue attracting interest at 15% until payment in full. The appellant was also notified that he would also be responsible for the cost of the notification and that if the loan was not repaid then the security would be sold to recover the amount. Pursuant to that notification by the auctioneer the appellant went and settled the outstanding amount. However, when he sent his wife to collect the title deed from the respondent she was told it could not be released unless the appellant paid auctioneers fees in the sum of Kshs. 52,000/=. He therefore sued for return of his title deed and in his plaint made a prayer for refund of Kshs. 54,000/= which he alleged to have overpaid to the respondent.

On its part, the respondent while conceding that the appellant had repaid the entire loan amount contended that it could not discharge the security as he was yet to settle the auctioneer’s fees.

After hearing and considering the evidence from both sides, the trial Magistrate found that the appellant had not proved his claim in regard to overpayment and dismissed it. He also found that the appellant was liable to pay the auctioneer’s fees. In the end the appellant’s suit was dismissed and he was ordered to pay the costs.

Being aggrieved the appellant preferred this appeal the gist of which is that the decision reached by the trial Magistrate was against the weight of evidence.

The respondent contends that the appeal is incompetent and fatally defective as the appellant did not annex a copy of the decree appealed from to his memorandum of appeal. In my view however that is a procedural technicality that flies in the face of **Article 159 of the Constitution** and I shall therefore proceed to determine the appeal on its merits.

Both sides filed written submissions. As a first appellate court I am enjoined to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses who gave evidence (***See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123***).

The respondent conceded that the appellant fully repaid the amount advanced and the only issues in contention were whether he had overpaid by a sum of Kshs. 54,000/= (amount claimed in the plaint) and whether he was liable to pay the auctioneer’s fees.

At the hearing the appellant testified that he borrowed a sum of Kshs. 358,030/= on 8th May 2015 and he was to repay the sum in monthly instalments of Kshs. 18,600/=. He admitted that he did not repay as agreed but that upon getting the auctioneer’s notice he paid Kshs. 30,000/=. another Kshs. 20,000/= on 19th July 2017 and Kshs. 412,000/= on 1st August 2017. Since neither the appellant nor the respondent produced the loan agreement this court is not in a position to determine what its terms were but I agree with the Learned Trial Magistrate that being a loan the sum advanced must have attracted interest and penalties as is indeed discernible from the statement produced by the appellant at the hearing (P Exhibit 63). From the documents produced by the appellant this court is unable to come to the conclusion that he overpaid the sum advanced either by Kshs. 54,000/= as averred in the plaint or by Kshs. 73,330/= as asserted in his testimony before the trial

court. The respondent did not admit the overpayment either in the witness statement, defence or evidence and it therefore behoved the appellant to prove the overpayment on a balance of probabilities. He did not and I find that his claim for refund of the alleged overpaid sum was properly dismissed.

As regards the auctioneer's fees since neither the loan agreement nor the charge instrument were tendered in evidence it is difficult to determine whether this was a formal charge as envisaged in **Section 79 (5) of the Land Act** or an informal charge as provided in **Section 79 (6) of the Act**. This is material given that the consequences of default differ depending on the nature of the charge. **Section 79 (5) of the Land Act** provides that a formal charge cannot take effect unless it is registered and a chargee cannot exercise any of the remedies under the charge unless it is so registered. On the other hand, **Section 79 (6) of the Act** suggests that an informal charge need not be registered. **Section 79 (7)** prohibits a chargee from taking possession or selling land which is the subject of an informal charge before first obtaining an order of the court. In effect therefore if this was an informal charge the respondent could not take possession or sell the appellants land without first obtaining an order of the court.

On the other hand, **Sections 90 (1) and 96 (1) of the Act** require a chargee of a formal charge to serve a statutory notice upon the chargor. **Section 96 (3) of the Act** provides that it is only if the chargor does not comply with the notice within ninety days of service of that notice that the chargee may: -

- “ (a) Sue the chargor for any money due and owing under the charge.
- (b)
- (c)
- (d) Enter into possession of the charged land; or
- (e) Sell the charged land;
”

The trial court before coming to the conclusion that the appellant was liable to pay the auctioneer's fees should first have determined whether the respondent's power of sale had matured before instructing the auctioneer to sell the appellant's property. If it was an informal charge had the respondent obtained leave of the court to sell the land and if it was a formal charge had the respondent served a statutory notice upon the appellant? The respondent did not contend that it did either of the above. It had no legal basis therefore to instruct the auctioneer to sell the appellant's land and the appellant was not therefore bound to pay the auctioneer's fees and I do so find. It is my finding that the notice served upon the appellant by the auctioneer is not the statutory notice envisaged by **Section 90 (1) or Section 96 (1) of the Land Act** and as the same was issued before obtaining an order of the court (if charge was informal) or before service of a statutory notice (if formal charge) it could therefore not suffice. The trial Magistrate's finding that the appellant was bound to pay the auctioneer's fees was therefore a misdirection as it did not take the law into account and it is set aside.

Section 102 of the Land Act reserves the appellant's right to discharge of charge upon payment of any sum due and as the respondent's witness expressly admitted that the appellant fully paid what was due to it is my finding that the appellant was and still is entitled to the discharge of the charge and to return of his title document. His appeal succeeds to that extent and as he has succeeded only partially he shall be entitled to half the costs of this appeal. It is so ordered.

Signed, dated and delivered electronically at Nyamira this 4th day of February 2021.

E. N. MAINA

JUDGE