REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 135 OF 2018

(Formerly HCA No. 75 of 2016 and ELCA No. 59 of 2017)

WESLEY KIBAGENDI JASON.....APPELLANT

VERSUS

ECO BANK LTD.....1ST RESPONDENT

GESOKO CONSTRUCTION LIMITED.....2ND RESPONDENT

(An appeal arising from- the ruling and order of the Hon. BS Khapoya, Senior Resident Magistrate (SRM), in Kakamega CMCCC No. 30 of 2016 of 5th September 2016)

RULING

1. The Motion dated 13th October 2016 principally sought an injunction pending appeal to restrain sale of the property the subject of the orders that are the subject of the appeal. The property in question was Butsotso/Shikoti/2988, which the appellant had offered as collateral for a loan advanced by the 1st respondent to the 2nd respondent. Apparently, the borrower, the 2nd respondent, defaulted in its obligations to the 1st respondent under the loan agreement, which necessitated that the 1st respondent, as chargee, goes after the charged property. The appellant, as chargor, then initiated a suit in Kakamega CMCCC No. 30 of 2016, to stop the chargee from exercising its right of redemption under the charge.

2. An interlocutory application dated 5th February 2016 was filed in Kakamega CMCCC No. 30 of 2016, seeking injunctive orders to stop the sale of Butsotso/Shikoti/2988 under the charge, on grounds that the 1st respondent as a chargee had not served the statutory notice, the right to sell the property had not crystallized, the right to sell the property had not matured, and that he needed time to redeem the property. He attached to the application copies of a search certificate of Butsotso/Shikoti/2988 to show registration of the charge and the fact that it was subject to rights under sections 82 and 83 of the Land Registration Act, No 6 of 2012; a copy of the charge document and a copy of the notice advertising the sale of the property by public auction.

3. The application was placed before Hon. Khapoya, SRM, on 8th February 2016, and he granted temporary relief pending *inter partes* hearing.

4. Responses were filed to the application by both respondents. According to the 1st respondent, it entered into an arrangement with the 2nd respondent to lend it money. The 2nd respondent nominated the appellant as the chargor, and he offered Butsotso/Shikoti/2988 as security. A charge was drawn over Butsotso/Shikoti/2988, and was duly executed and registered. The loan was disbursed and utilized, but was not fully paid nor settled by the 2nd respondent. It was contended that the 1st respondent always supplied the borrower with the loan statements and engaged the 1st respondent in correspondence over the loan. It was argued that on account of the default in paying the debt timeously the right to dispose of the property by way of sale had accrued. It was argued further that the step taken by the 1st respondent to exercise its right under the charge to sell the property did not amount to a violation of the appellant's constitutional rights over ownership of the subject property. It was contended that the 1st respondent took all the relevant steps to comply with the relevant law before the sale was effected. That included getting a valuation of the property, issuance and service upon the appellant of statutory notices, issuance of notices of intention to sell and issuance of redemption notices and notification of sale. It was asserted that an injunction would prejudice the 1st respondent. Those arguments were set out in a statement of defence dated 4th March 2016 and an affidavit sworn on even date.

5. To that affidavit were attached several documents. The money lending contract between the two respondents dated 21st June 2013, a memorandum of acceptance of the loan by the 2nd respondent, the charge document relating to Butsotso/Shikoti/2988 executed by the appellant and officers of the 1st respondent, an affidavit of consent by the appellant's spouse Mary Atieno, copy of the title deed for Butsotso/Shikoti/2988 showing registration of the charge, copies of loan account statement for divers months copies of correspondence from

the 2nd respondent over the loan, a notice to 2nd respondent and the appellant and others dated 21st October 2014 of intention to sell the charged property over the outstanding moneys, copies of certificates of posting of the notice to the 2nd respondent and its advocates and the appellant, copies of a notification of sale by Watts Auctions dated 4th June 2014, and copies of registered postal packets posted by Watts Auctions with respect to the notice.

6. The response by the 2nd respondent was to concede the loan, and that it had fallen into arrears with respect to its obligations under the loan arrangement, but blamed it on failure by the government to pay it for contracts it had undertaken on its behalf, undertaking that it would meet those obligations once the government came through. It argued that the application by the appellant was premature.

7. The application was canvassed by way of written submissions. In the end the trial court was persuaded that there was default under the lending agreement and, therefore, the right to sell the charged property had accrued and that the 1st respondent had complied with the law by giving all the necessary notices under the law, and declined to confirm the injunctive orders that it had made temporarily earlier. That was what provoked the appeal.

8. In the grounds of appeal listed in the memorandum, dated 20th September 2016 and filed herein on 22nd September 2016, it is averred that the loan guaranteed by the appellant had been fully paid, the right to sell the property had not crystallized, sufficient notice had not been served, and sections 104 and 105 of the of the Land Act, No. 6 of 2012 were not taken into account.

9. Directions were given on 16th February 2017 that the application be disposed of by way of written submissions. I have seen from the record two sets of written submissions, filed by the appellant and the 1st respondent.

10. In its written submissions the appellant has argued that the charge was defective, it was not registered with the lands office, no notices were given to the appellant as chargor and his spouse, the spouse had not executed the charge and that the money advanced had been paid in full. On its part the 1st respondent addressed issues relating to whether the 2nd respondent had indeed received the loan money and utilized it, whether the charge was valid or defective or enforceable, whether the money guaranteed had been paid in full, whether the statutory notices issued were valid, whether or not there was no valid consent, whether the 1st respondent was entitled to exercise its statutory power of sale, whether the right to realize the security had crystallized, whether the 1st respondent should suspend the sale to await determination of arbitration, the intentions of the respondents and whether the conditions for grant of injunction had been met.

11. Let me at the very outset state that parties are bound by their pleadings. For the purpose of an appeal in civil proceedings, such as the instant one, the pleadings refer to the memorandum of appeal. The issues to be determined by the appellate court should be confined to the issues raised in the grounds of appeal. I raise this because I have noted from the written submissions on record that the appellant and the 1st respondent have addressed themselves to issues that fall outside of the grounds of appeal on record and which also did not arise before the trial court when it was determining the application that was before it. In determining the appeal before me, I shall confine myself to the grounds of application and the matters that were before the trial court.

12. The first ground of appeal is that the loan guaranteed had been paid in full. The first point to be made here is that the arrangement between the appellant and the 1st respondent was not in the nature of guarantee, but a charge. The appellant was not a guarantor but a chargor. Secondly, the loan arrangement was between the respondents, the appellant was not a party to the lending agreement, and was not the person to repay the loan. He merely offered his property as security or collateral. Between him and the 2nd respondent, he was the one least qualified to say whether or not the loan was paid in full. He did not plead in his plaint nor aver in his affidavit before the trial court that the loan had been paid in full. He is raising that issue on appeal, which makes it an afterthought. That averment is inconsistent with that by the 2nd respondent, that the loan was still outstanding as it had been unable to repay the loan as scheduled as the government let it down by failing to meet its obligations to it for the contracts the 2nd respondent was executing for the government. The 2nd respondent undertook on oath, in its replying affidavit, to repay the money once it was settled by the government. Those were the words of the borrower. The appellant's contention cannot, therefore, have any truth.

13. The second ground is that the right to sell the security had not crystallized. The right to dispose of a security arises or crystallizes when the borrower defaults in his obligations under the lending arrangement. It is common as between the two respondents, who are the parties to the loan agreement, that the 2nd respondent had fallen behind in its repayments, and, therefore, there was default, meaning that the right of the 1st respondent to sell the charged property had accrued or arisen or crystallized.

14. The third ground is that sufficient notice had not been issued or given. The appellant is no doubt raising this issue because in law the chargees power to realize the security should not be restrained so long as the power is being exercised properly. There would be no proper exercise of that power where the notices that are envisaged by the governing legislation have not been given.

15. According to the *Halsbury's Laws of England*, Vol. 32 (4th edition), paragraph 725:

> "*The mortgagee will not be restrained from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed in court, that is the amount the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."*

16. In *John PO Mutere & Another vs. Kenya Commercial Bank Ltd* HCCC No. 3125 of 1995 (unreported) it was said that:

> "*Once a power of sale has arisen a mortgagee has the right to exercise it. The Court has no power to prevent exercise of the power if it is being properly exercised. It is a power parliament has granted a mortgagee and courts cannot and ought not to interfere if it*

is being exercised."

17. The charging of property commoditizes it, in terms of making a commodity readily available in the land market in the event of default. A chargor freely and voluntarily charges his property well aware of the consequences of default in servicing the loan, principally that the property would liable to be sold in case of default. The court in *Andrew Muriuki Wanjohi vs. Equity Building Society Ltd* (2006) eKLR, said:

> *"Whenever the Applicant offered the suit property as security, he is conscious of the fact that if the borrower did not met his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the charger could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew that the property was capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it."*

18. It was remarked in *Nancy Wacici vs. Kenya Women Micro Finance Bank Ltd* [2017] eKLR , that:

> *"By offering the suit property as security the chargor was equating it to a commodity, which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable on the basis of the real market value of the said property. I find and hold that damages would be adequate remedy and therefore an injunction cannot be issued in the circumstances … I have reviewed the reasons advanced by the Applicant as far as the property is alleged to be family land is concerned. When the Applicant/guarantor gave the land as security, she sought to have contemplated a situation where the same could be sold off if the Applicant defaults … the rights of both the borrower and the bank are within the contractual framework and I would hesitate to interfere."*

19. Management of public and private land in Kenya is governed by the Land Act, No. 6 of 2012, which carries provisions relating to charges. The charge, the subject of this suit, was created in 2013, after the Land Act 2012 had come into force. section 80 of the Land Act has set out certain prerequisites with regard to the charge, in the following terms:

> *"(3) Every charge instrument shall contain—*
>
> *(a) the terms and conditions of sale;*
>
> *(b) an explanation of the consequences of default; and*
>
> *(c) the reliefs that the chargor is entitled to including the right of sale."*

20. Section 90 of the Land Act provides for remedies under the charge. The same states as follows:

> *"90. Remedies of a chargee*
>
> *(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.*
>
> *(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—*
>
> *(a) the nature and extent of the default by the chargor;*
>
> *(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;*
>
> *(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;*
>
> *(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and*
>
> *(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.*
>
> *(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may —*
>
> *(a) sue the chargor for any money due and owing under the charge;*

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land ..."

21. Going by the above it should be clear that before the power of sale is exercised, a notice must be given to the chargor. The notice envisaged under that provision is issued in circumstances where the chargor defaults in any of the obligations under the charge, and the default continues for one month. It is that statutory notice under, section 90 of the Land Act, that initiates the process, through which the chargee exercises the remedies specified in section 90(3) of the Act. The ingredients of the notice are specified in section 90(2) of the Land Act. The first is the nature and extent of default. Second, where the default consists of non-payment, the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, what the chargor should do or desist from doing so as to rectify the default. The third one is the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth one is that the chargor has the right to apply to court and seek any relief or challenge the exercise by the charge of any of the statutory remedies. The notice should crystalize after the expiry of ninety (90) days from the date it is received by the chargor. The notice contemplated by section 90 the Land Act is mandatory and statutory. The right to access the remedies stated in that provision accrues only after full compliance with the legal framework on statutory notices.

22. Does the statutory notice on record satisfy the requirements of that law? The notice that the respondent relies on as its statutory notice under section 90 is that dated 14th February 2014. I have carefully perused through the said notice, and I am persuaded that it largely complies with section 90(2) of the Land Act, save for the omission to inform the chargor of the remedies he has under the provisions. I hold the view that the omission is minor, and should not form a basis for restraint of the 1st respondent's right to exercise the power of sale.

23. Section 96 of the Land Act deals with what should follow where the chargor fails to remedy the default in accordance with the notice issued under section 90(1). The said provision states as follows:

"Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell."

24. My understanding of this provision is that the chargor is entitled to another notice of not less than forty (40) days under section 96(2) of the Land Act, before the chargee can sell the charged property. The notice under section 96(2) of the Land Act is equally statutory and mandatory.

25. The said notice is often confused with the redemption notice issued under Rule 15 of the Auctioneers Rules, and do not bother to issue it, assuming that the redemption notice issued by the auctioneer instructed would suffice as a notice under section 96 of the Land Act. The requirement in section 96(2) of the Land Act is similar to that in Rule 15 of the Auctioneers Rules, 1997. The only major difference between them is that the notice contemplated under Rule 15 of the Auctioneers Rules is forty-five (45) days and not the forty (40) days contemplated under section 96.

26. in *Albert Mario Cordeiro & anor vs. Vishram Shamji* (2015) eKLR it was stated that:

"... the requirements under section 96(2) of the Land Act are mandatory and quite separate from the requirements under the Auctioneers Act. The Redemption Notice under the Auctioneers Act is also mandatory but it is issued separately from and after the one under section 96(2) of the Land Act; strictly in that sequence ... in the absence of a Notice to Sell under section 96(2) of the Land Act, the Statutory Power of Sale cannot be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice have been issued. This is a potent ground for an injunction."

27. In *David Ngugi Ngaari vs. Kenya Commercial Bank Limited* [2015] eKLR, it was said:

'Of importance, when Parliament enacted section 96(2) of the Land Act, the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the Constitution. Again, rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee. It is not specially tailored for purposes of section 96(2) of the Land Act. One other important thing: Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But now it has gained statutory expression in section 89 of the Land Act which provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption. I refuse that section 96(2) of the Land Act is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the Auctioneers Act.'

28. I have carefully perused through the record before me, and I have seen the notice dated 21st October 2014, which was given after that dated 14th February 2014, and it gave the appellant, and the other parties, a forty (40) days notice. In my view, section 96 was complied with. The notices under the Auctioneers Act were also served. So far as notices were concerned, I am persuaded that the 1st respondent had fully

complied with the law.

29. The last ground of appeal is that the trial court did not take into account sections 104 and 105 of the Land Act. These provisions relate to consideration of other remedies. The issue was not before the trial court, although that of itself did not stop the court considering alternative remedies. However, a court cannot consider such alternatives blindly. Certain facts ought to be placed before it by the parties. No such facts were placed before the trial court to enable it consider the alternatives.

30. As stated above, I shall not address any of the issues that did not arise before the trial court, neither should I address matters that are not raised in the grounds of appeal. That would include the question as to the validity of the charge. It did not arise before the lower court, neither is raised in the memorandum of appeal.

31. I am not persuaded that a case has been made out for me to grant the orders sought in the application. The application before me is without merit and I hereby dismiss the same with costs.

32. Even though I have decided what I was called upon to decide, I must state that I have serious misgivings as to whether I have any jurisdiction to handle a dispute that revolves around a charge created under the Land Act. I say so with the provisions in sections 2 and 150 of the said Land Act in mind. The said provisions state as follows:

> *"2. "Court" means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011).*
>
> *150. Jurisdiction of the Environment and Land Court*
>
> *The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."*

33. The dispute before me is on land. The principal prayer in the suit before the trial court is for an order to declare the exercise of the power of sale of the charged land illegal. That prayer centres on the land the subject of the suit, and specifically on the power to enforce the charge so as to sell the land. The matter also dwells on the application of sections 90 and 104 of the Land Act. The transaction herein has two elements. There is the moneylending contract between the borrower and the lender, and then there is the charge contract between the chargor and the chargee. The moneylending contract is governed by banking law, while the charge agreement is subject to land legislation. The High Court does have jurisdiction over disputes around the moneylending aspect, but it has no jurisdiction over the charge since the same is created and regulated by the Land Act.

34. The Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, expressly stated, on the matter of jurisdiction, that jurisdiction is everything, and a court without jurisdiction should down its tools. The exact words of the court were:

> *"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

35. Jurisdiction is conferred by the Constitution and by legislation. With regard to land matters, the Constitution, at Article 162(2) (a), located in an article which provides for the system of superior courts in Kenya, allocates jurisdiction over land matters to a court, with status equal to the High Court, to be established through an Act of Parliament. Article 162 states:

> *"162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).*
>
> *(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*
>
> *(a) …*
>
> *(b) the environment and the use and occupation of, and title to, land.*
>
> *(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."*

36. Parliament passed legislation, the Environment and Land Court Act, No. 19 of 2011, in obedience to Article 162(2)(3) of the Constitution, to establish the court envisaged in Article 162(2) (b), and to set out the jurisdiction of the said court. The preamble to the said Act states its objective to be: -

> *"… to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes."*

37. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which states as follows:

"*13. Jurisdiction of the Court*

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes –

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land."

38. Section 13(d) of the Environment and Land Court Act, no doubt, covers charges, being contracts or instruments that grant enforceable interests in land. A charge creates an interest in favour of the chargee in the property of a chargor, which is enforceable through exercise of the statutory power of sale. Any disputes that arise with respect to exercise of that right are disputes that fall within section 13(e) of the Environment and Land Court Act, and, therefore, within the jurisdiction exercisable by the Environment and Land Court, by virtue of sections 2 and 150 of the Land Act.

39. Article 165 of the Constitution establishes the High Court and sets out the scope of its jurisdiction. Article 165(5) specifies areas in which the High Court has no jurisdiction, and these include matters that fall under Article 162(2) of the Constitution. The relevant portions of Article 165 state as follows:

"*(5) The High Court shall not have jurisdiction in respect of matters—*

(a) …

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2)."

40. The plain effect of these provisions is that the High Court has no jurisdiction to handle matters that fall under the jurisdiction of the Environment and Land Court. The dispute that has been placed before me relates to enforcement of a charge, which is an instrument which confers an enforceable interest in land. The creation of a charge and the process of its enforcement are governed by the Land Act, and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court, as envisaged by the Land Act and the Environment and Land Court Act, whether in exercise of its original or appellate jurisdiction.

41. The Constitution is emphatic that the High Court shall not superintend over disputes that fall within the jurisdiction of the courts contemplated by Article 162(2) of the Constitution. I doubt whether I have any jurisdiction over these matters, and I wonder whether I am not acting contrary to the Constitution by assuming jurisdiction over this matter.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 17th DAY OF January, 2020

W MUSYOKA

JUDGE