



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 91 OF 2019

NATIONAL BANK OF KENYA LTD.....APPELLANT

VERSUS

CHRISTIAN COMMUNITY LIFE CHURCH.....RESPONDENT

(An appeal from the ruling and order of Hon. T. M. Mwangi SPM made on 25/7/2019 in the Meru CMC ELC No. 19 of 2019)

J U D G M E N T

1. By a plaint dated 10/2/2019, the respondent alleged that through an advertisement in the Daily Nation of 26/1/2000, the it learnt that the appellant would exercise its statutory power of sale over **LR. No. Ntima/Igoki/5260 (“the suit property”)**. In pursuance thereof, on 11/2/2000 the respondent purchased the suit property through the public auction.

2. The respondent further alleged that it paid the entire purchase price totaling Kshs. 230,000/-, took possession thereof and constructed a huge church wherein its congregants worship to-date. However, the appellant failed to transfer the suit property to the respondent.

3. In the premises, the respondent prayed for an order that the appellant be compelled to execute all the necessary documents for the transfer of the suit property to the respondent. In default, the respondent prayed that the necessary documents be executed by the Executive Officer of the Court.

4. By a statement of defence dated 18/3/2019, the appellant denied the respondent’s claim and stated that, although the suit property was advertised for sale and the respondent declared the highest bidder at the auction, it only paid Kshs. 57,500/- being the 25% but failed to pay the balance. That as a result, the sale fell through.

5. The appellant further alleged that it had been served with a Rectified Certificate of Confirmation in the **Meru HC Succession Cause No. 661 of 2013** in which the property is shown to have been distributed to other persons. That in the premises, the appellant has no land to transfer to the respondent. The appellant concluded that the claim was statute barred due to time lapse.

6. On 13/5/2019, the appellant raised a Preliminary Objection respondents suit on the grounds that; the suit was time barred by dint of **sections 4(a), 7 and 17 of the Limitation Act** and that the suit was vexatious and an abuse of the court process. In its submissions filed subsequently, the appellant adumbrated on the second ground to be that, the respondent had no locus in law to bring the suit since it was an incorporated body.

7. The trial Court dismissed the preliminary objection thereby provoking the present appeal. The appellant raised a total of 9 grounds of appeal which can be collapsed into three as follows: -

a) The trial Court misconstrued the decision in Habib Bank AG Zurich v. Rajnikant Shah [2018] Eklr thereby arriving at a wrong decision.

b) That the trial Court failed to grasp the respondent’s cause of action thereby misconstrued the applicable principles and law.

c) That the trial Court erred in holding that the issue of locus standi of the respondent was premature.

8. On 12/9/2019, the respondent filed a Preliminary Objection to the appeal. It contended that this Court lacks jurisdiction to entertain this appeal by dint of **Article 162(2) of the Constitution** and **section 13 of the Environment and Land Court Act**.

9. The parties filed their respective submissions which the Court has considered. It was agreed that the decision on the preliminary point of law be determined together with the main appeal. This judgment is therefore in respect of both the preliminary point and the appeal.

10. It was the respondent's contention that vide **Articles 162(2)(b) and 165(5)(b) of the Constitution**, the High Court lacks jurisdiction to hear the present appeal. It was further contended that under **section 16A of the Environment and Land Court Act** any appeals from the subordinate court, as is the present ones, are only appealable to the Environment and Land Court ("the ELC").

11. For the appellant, it was submitted that since the suit emanates from a charge registered against the suit property, this is a commercial transaction and has nothing to do with a claim on land. The case of **Co-operative Bank of Kenya Limited v. Patrick Kang'ethe Njuguna & 5 Others [2017] Eklr**, was relied on in support of that submission.

12. Under the authority of the **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696**, a preliminary objection is in the nature of demurrer. It is raised on a purely point of law and is based purely on the pleadings. It is determined on the basis that the facts as pleaded are admitted.

13. The cause of action upon which the respondent's claim was based, was pleaded in paragraphs 4 to 7 of the plaint. In those paragraphs, the respondent stated that its claim arose from the appellant's exercise of statutory power of sale. That pursuant to the said exercise, the parties entered into a contract of sale for the purchase by the respondent and sale by the appellant of the suit property.

14. In the case of **Co-operative Bank of Kenya Limited v. Patrick Kang'ethe Njuguna & 5 Others (supra)**, the Court of Appeal was categorical that matters of charges and mortgages are contractual and do not belong to the ELC but the High Court. The fact that the respondent wrongly misconstrued its cause of action and lodged its claim in the land and environment division of the subordinate court that did not make the claim to be one for land.

15. The respondent clearly pleaded that, it sought the enforcement and specific performance of a contract entered between it and the appellant in February, 2000. A party cannot clothe a court with jurisdiction. Jurisdiction is derived from either the Constitution or statute.

16. In view of the foregoing, the preliminary objection by the respondent was misconceived and has no merit. The appeal was properly lodged in this Court. The preliminary objection is accordingly dismissed.

17. Turning to the main appeal, the same challenges the trial court's order dismissing the appellant's preliminary objection.

18. The first ground was that the trial Court misconstrued the decision in **Habib Bank AG Zurich v. Rajnikant Shah [2018] Eklr** ("the Habib Case") thereby arriving at a wrong decision. It was submitted for the appellants that the said case was as between the parties to the Charge unlike in the present case. On the other hand, the respondent submitted that the dicta in the said case was not specific that it only applied to the parties to the charge but was of a general application.

19. I have considered the entire Habib Case. The suit was commenced by a chargor against the chargee (bank). The chargor claimed that since the Charge was a contract between them and the bank had not recovered its outlay within the time limited for enforcement of contracts, the Charge should be discharged. It is on that basis that the Court of Appeal held that a Charge is a continuing security whereby so long as the same has not been discharged, limitation does not set in.

20. The continuing security that the Court was referring to in the Habib Case was the contract embedded in the Charge itself. The contract of offering the land as security in consideration of affording one financial accommodation or facilities. That contract is as between the parties thereto, the chargor and the chargee. To this Court's mind, the same does not extend to 3rd parties who are not parties thereto.

21. In the present case, the respondent was not suing the appellant on the Charge over the suit property. Its suit was categorical. It was based on the contract for sale entered between them on 11/2/2000 in the appellant's exercise of its statutory power of sale. That was not a continuing security over the suit property. It was a contract for sale between them.

22. In this regard, to the extent that the trial Court applied holding in the Habib Case to the contract between the respondent and the appellant, it fell into error. That ground succeeds.

23. The second ground was that the trial Court failed to grasp the respondent's cause of action thereby misconstrued the applicable principles and law. It was submitted for the appellant that the respondent's cause of action was based on the Memorandum of sale dated 11/2/2000 and not otherwise. That the trial Court failed to grasp that fact and thereby failed to discontinue the respondent's case. The case of **Delphis Bank Ltd v. Madhvani [1993] Eklr** was cited in support of that submission.

24. It was submitted for the respondent that the suit emanated from the exercise of the statutory power of sale by the appellant. That since the statutory power of sale is tied to the Charge over the property and is still registered against the title, the security is a continuing security upon which no limitation attaches. The case of **Habib Bank AG Zurich v. Rajnikant Shah (supra)** was cited in support of that submission.

25. As already stated above, the respondent's cause of action was set out in paragraphs 4 to 7 of the plaint. It was based on the Memorandum of sale entered on 11/2/2000 between the auctioneer on behalf of the appellant and the respondent. The memorandum was produced at page 22 of the record.

26. While it is true that the exercise of the statutory power of sale by the appellant must have been pursuant to a Charge over the suit property, that Charge was not part of the memorandum of sale of 11/2/2000. The alleged Charge was not produced and even if it was produced, it must have been between the appellant and one **Ephraim Mbae Thurania** and not the respondent. The respondent is not sitting on the exercise of the statutory power of sale but a written contract between it and the appellant respondent cannot seek to extend its interest and rights beyond the memorandum that gave it the interest in the suit property.

27. In view of the foregoing, this Court holds that the respondent's cause of action was on the contract dated 11/2/2000. That being the case, the same was subject to **section 4 of the Limitation of Actions Act**. Under that section, a claim under contract has a lifespan of six years only. The parties thereto could only have enforced the same by 10/2/2006 and not later.

28. Obviously by the time the respondent lodged the suit in February, 2019, it was hopelessly out of time. The suit was time barred and could not be continued with. It is surprising that the respondent waited for nineteen years to seek to enforce the subject contract.

29. The appellant contended that the property had been transmitted to a 3rd party vide some succession cause and that it did not have any land to transfer to the respondent. That does not leave the respondent without a remedy. The respondent has contended that it took possession of the suit property in 2000, developed the same and has continued to be in possession thereof.

30. Obviously, if the respondent wanted to have the property registered in its name, the best cause should have been and still is to lodge a claim for adverse possession in the proper court against the registered owner but not seek to enforce a stale contract.

31. The last ground was that the trial Court erred in holding that the issue of *locus standi* of the respondent to lodge the suit was premature. It was submitted for the appellant that the respondent was registered under the **Societies Act, Cap 108 of the Laws of Kenya**. That as such, the respondent was not a legal person and could not sue in its own name. The cases of **Daniel Nyaga Mvungu v. ACK Diocese of Mbeere [2019] Eklr** and **ACK St. Peters Church, Gatunduini v. Secretary Murang'a County Government & Another [2015] Eklr** were relied on in support of that submission.

32. On the other hand, it was submitted for the respondent that the Certificate of registration produced before the trial Court was issued in 2014 yet the respondent existed in 2000. That it was therefore imperative to wait for evidence to establish in what capacity the respondent purchased the suit property in 2000. That the issue required evidence to be determined and it was being raised prematurely.

33. It was further submitted that this was a technical objection which should not be allowed to stifle the respondent's right to be heard. The cases of **Grace Mwenda Munjuri v. Trustees of the Agricultural Society of Kenya [2017] Eklr** and **Richard Nchapi Leiyagu v. IEBC & 2 Others [2013] Eklr** were cited in support of those submissions.

34. In the plaint, the respondent described itself as *"a church duly registered under the Societies Act and Rules"*. It then produced a Certificate of Registration No.15972 dated 1/9/2014. Although the respondent submitted that the Court ignores the said Certificate since it was issued 14 years after the date of the contract the subject of the suit, that cannot stand.

35. The respondent did not deny that it was a church registered under the **Societies Act Cap 108 of the Laws of Kenya**. It is common knowledge that, entities registered under the said Act are not legal entities that can sue or be sued in their own name. They are but unincorporated entities They can only sue or be sued in the names of their officials.

36. In the case of **Living Water International v. City Council of Nairobi [2008] Eklr**, the Court held:-

"A reading of section 3 of the Societies Act Cap 108 Laws of Kenya as well as the case law on the subject goes to show, that a religious society has no legal capacity to sue, and to be sued. This being the case, the plaintiff/applicant had no capacity to not only present the interim application, but the main suit as well. Both processes are therefore a nullity and proper candidates for striking out and are accordingly struck out"

37. In the case of **Kituo Cha Sheria v. John Ndirangu Kariuki & Another [2013] Eklr**, it was observed that: -

"As a general rule, unincorporated legal persons

including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietor's names."

38. The basis for an unincorporated association lacking capacity to sue and be sued in its own name is clear. A voluntary association, being only a collection of individuals who in the absence of an enabling statute, cannot sue or be sued in the common name. The proper course, as is the case with partnerships, is to sue through the registered officials of such an association. In such circumstances.

39. In **David Kamau Njoroge (Deceased) v. Savings and Loan (K) Ltd [2006] Eklr**, the Court held:-

"It is now trite law that a suit instituted by a person who has no capacity or locus to institute it, is a non suit such a suit is null and void from the beginning"

40. From the foregoing, it is clear that the trial Court was in serious error when it held that the issue for the locus standi of the respondent had not arisen. The issue was live before the court and it should have risen to the occasion by making a determination thereon. Accordingly, the trial Court was in error and its holding cannot stand.

41. Accordingly, in view of the foregoing, I am satisfied that the appeal is meritorious and is hereby allowed with costs. The preliminary point of law of the appellant before the trial Court is allowed. The suit is hereby stuck out. The appellant will have the costs here and below. As I have already stated, the respondent is not without a remedy. It only needs to do what is required by law and it will achieve its goal.

DATED and DELIVERED at Meru this 21st day of May, 2020.

A. MABEYA

JUDGE