



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL APPEAL NO.10 OF 2018

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

VERSUS

ISAAC MALIKA LUBANGA.....1ST RESPONDENT

MAXWELL MARTIN MUTUKU MUTINDA.....2ND RESPONDENT

JUDGMENT

1. The Appellant M/s NATIONAL BANK of KENYA LIMITED and the 2nd Respondent MR. MAXWELL MARTIN MUTUKU MUTINDA were jointly sued by the 1st Respondent ISAAC MALIKA LUBANGA as 1st and 2nd defendants respectively, praying for judgment against the Appellant herein and the 2nd Respondent jointly and severally for:-

i. A declaration that the purported sale of the suit property by the 1st Defendant to the 2nd Defendant AND the purported transfer to the 2nd Defendant, and the registration thereof in favour of the 2nd Defendant; are irregular, illegal, null and void, and of no effect, and the same be set aside.

ii. An order that the registration of the transfer by the 1st Defendant to the 2nd Defendant be set-aside, cancelled and reversed, and the requisite land register be amended and/or rectified accordingly.

iii. A Permanent order of injunction restraining the Defendants, whether acting jointly or severally, or through their successors, assignees, servants, or agents, or the successors, assignees, servants or agents of any of them, from interfering with the Plaintiffs right, title and interest in the suit-property and his possession of the same; and/or restraining them from trespassing upon the suit property.

iv. A declaration that the 1st Defendant does have the Plaintiff's name removed from the list of debtors held by the Credit Reference Bureau to enable the 1st Defendants employer, namely Barclays Bank of Kenya Limited assume and take over the debt due to the 1st Defendant by the Plaintiff.

v. Costs of the suit, together with interest thereon, calculated at court rates.

2. After hearing a notice of motion dated 8th March 2017 seeking orders of injunction to issue against the Appellant and the 2nd Respondent from interfering with the 1st Respondent's right, title and interest in the suit property known as L.R. 209/20519/R 72351/521 measuring 0.0228 Hectares situated in the City of Nairobi, the trial court granted orders sought in the aforesaid application, provoking the Appellant to prefer the instant Appeal against the said ruling.

3. The Appellant preferred an appeal dated 4th September 2017 and later filed an amended Memorandum of Appeal dated 18th January setting aside six (6) grounds of Appeal being as follows:-

1. THAT the learned magistrate erred and misdirected himself in law and in fact by failing to appreciate sufficiently or at all, consider and correctly apply the applicable legal principles that fall for consideration in determining the 1st Respondent's notice of motion application dated 08/03/2017.

2. THAT the learned magistrate erred and misdirected himself in law and fact by making a finding that the Appellant had not verified that the postal address used in dispatching statutory notices to the 1st Respondent belonged to him when the

correctness of the postal address had not been disputed by the 1st Respondent who had indeed confirmed under oath, in the affidavits filed in the suit, that the postal address so used belonged to him.

3. THAT the learned magistrate erred and misdirected himself in law and fact by failing to consider or sufficiently consider the submissions made on behalf of the Appellant and the authorities binding on him relied upon in that respect on behalf of the Appellant in opposition to the 1st Respondent's application dated 08/03/2017 and thereby arriving at a manifestly wrong decision.

4. THAT the learned magistrate erred and misdirected himself in law and fact by failing to appreciate, consider and hold that on the basis of the material placed in evidence by the parties as well as the clear provisions of section 99 (4) of the Land Act, 2012, a relief in the nature of an order for injunction as sought in the notice of motion application dated 08/03/2017 was not available to the 1st Respondent.

5. THAT the learned magistrate erred in law by delivering his ruling on the 1st Respondent's notice of motion application dated 08/03/2017 in violation of the clear provisions of Order 40 Rule 5 of the Civil Procedure Rules.

6. THAT the learned magistrate erred and misdirected himself in law and in fact by failing to give any justifiable reasons for granting the orders appealed against.

4. At the hearing of the Appeal on 20/6/2018 Mr. Juma, learned Advocate held brief for Mr. Mutua, learned Advocate, for the Appellant whereas Miss Eyase, learned Advocate, held brief for M/s Mburu for 2nd Respondent; Ms Njenga Muchai, learned Advocate, appeared for the 1st Respondent when directions were given that the appeal be determined by way of written submissions. That submissions were to be filed and served within 14 days from the date of the order and response was to be filed within 14 days from the date of service. The matter was subsequently set down for highlighting on 25th July 2018.

5. When the matter came up for highlighting on 25th July 2018 Mr. Mwalimu, learned Advocate, held brief for Miss Mburu, for the 2nd Respondent, Mr. G.M. Mutua, learned Advocate, appeared for the Appellant whereas there was no appearance for the 1st Respondent. It turned out that only the Appellant's counsel had filed written submissions on 2nd July 2018. Mr. Mwalimu, appearing for the 2nd Respondent informed the court that they would not be filing submissions as they were supporting the appeal. There was no explanation for none appearance of the 1st Respondent nor for failure to have filed the submissions. That as the date for highlighting had been given in open court in presence of all Advocates representing the respective parties the appellant was allowed to proceed with the Appeal.

6. Mr. G.M. Mutua, learned Advocate, for the Appellant in arguing the appeal, he abandoned ground No.5 of the appeal and combined grounds nos. 1, 2 and 6 arguing them as one ground. He then combined grounds nos. 3 and 4 and argued them together.

Background of the case

7. The 1st Respondent as a former employee of the Appellant had obtained a mortgage finance facility from the Appellant to finance the purchase of a property known as LR. No. 209/20519 Nairobi (*hereinafter "Suit Property"*). As security for the repayment of the said facility, the 1st Respondent created in favour of the Appellant a legal charge for the sum of Kshs. 20 Million over the Suit Property.

8. The suit property was sold by the Appellant in exercise of its chargee's statutory power of sale in a public auction held on 14/12/2016. The 2nd Respondent submitted the successful bid during the said auction and therefore was declared the purchaser of the Suit Property.

9. The Respondent filed suit in the subordinate court on 9/03/2017 against the Appellant and the 2nd Respondent. In essence, the suit sought to challenge the sale of the Suit Property by the Appellant to the 2nd Respondent in the public auction aforesaid. Together with the Plaintiff, the 1st Respondent filed an interlocutory application seeking an injunctive relief pending the hearing and determination of the suit to restrain the Appellant and the 2nd Respondent from dealing with the Suit Property in the manner set out in prayer 3 of the application. (*See copies of the Plaintiff's pleadings in the said suit at pages 10-57 of the Record of Appeal*).

10. The basis upon which the interlocutory application was presented was the allegation that;

i. The Suit Property was sold and transferred to the 2nd Respondent fraudulently because the 2nd Defendant had not complied with the conditions of sale;

ii. No statutory notice was served upon the 1st Respondent.

iii. The Suit Property was sold at an under value; and

iv. The 1st Respondent would be rendered destitute as the Suit Property was his family home.

11. The Appellant and the 2nd Respondent opposed the said interlocutory application on the basis of the Replying Affidavits at pages 60-123 and 125-147 of the Record of Appeal respectively. Each of the parties to the suit in the subordinate court filed written submissions in respect of the interlocutory application aforesaid. (*See pages 148-148, 150-168 and 169-176*) of the Record of Appeal for the 1st Respondent's, Appellant's and 2nd Respondent's submissions respectively).

12. In the challenged ruling delivered on 7/08/2017 as pointed out in paragraph 1, the Honourable trial magistrate allowed the application in terms of prayer 3 restraining the Appellant and the 2nd Respondent from dealing with the suit property pending the hearing and determination of the suit. The 1st Respondent was also granted costs of the application.

13. In allowing the application, the Honourable magistrate reached the conclusion that the 1st Respondent had not been served with a statutory notice as the postal address used by the Appellant was not verified to be his. On this basis, the learned magistrate concluded that a prima facie case had been established and further that the 1st Respondent was bound to suffer irreparable loss.

14. The Appellant in support of the appeal urges the learned trial Magistrate identified any issue for consideration for the purposes of determination of the 1st Respondents application before him to be whether the Appellant had served the statutory notice upon the 1st Respondent prior to realizing its security comprised in the charge over the suit property. The learned trial magistrate stated:-

"The only issue for determination is whether service of statutory of notice was served upon the Applicant. The Land Act has set out clear procedure to be observed by a party when effecting service of such notice and the timeline to be observed."

15. The court in making its findings stated there was no verification as to whether the address used was verified and known to be that of the 1st Respondent. The court went on to state the 1st Respondent was an employee of the 2nd Respondent, his residence was known and nothing would hence have been easy than serving him personally with the said notice and that omission amounts to an ambush on him which contravenes the law. This made the court to make a finding that the 1st Respondent's postal address through which statutory notice had been sent by a registered post had not been verified and therefore there was doubt of to whether service of the same had been effected and on that basis the said magistrate concluded that a *prima facie* case had been made.

16. The learned magistrate in his ruling at page 183 indicated that Appellant had urged it had effected service of the notices through registered post where it noted:-

"The 1st defendant issued the plaintiff with a statutory notice dated 4th April 2016 in accordance with the provisions of section 90 of the Land Act 2012. That upon lapse of the notice the 1st defendant served the plaintiff with a 40 days' notice to sell dated 1st August 2016. That the samples were served through registered post."

The registered post is on page 86 of the sample bundle and shows that the letter was addressed to "Mr. Isaac Malika Lubanga P.o. Box 8938-00200 Nairobi" and 40 days' notice of intention to sell is on page 913. The Replying affidavit under paragraphs 18-32 of the Appellant at pages 64 and 65 of the record of appeal confirm sample of the notices by registered post and e-mail at pages 86-93 of the record of appeal. The address given thereto in "MMM 8", "MMM 9", "MMM 10", "MMM 11", "MMM 10" and "MMM 12" are similar postal and e-mail addresses. The postal address thereto in the Replying affidavit was not denied as that of the 1st Respondent; the supporting affidavit of the 1st Respondent at page 24 of the record of appeal is given as Isaac Malika Lubanga of P.o. 8938-00200, which is same as the postal address used by the Appellant to forward the notices.

17. In view of the above I find there was a misdirection and interpretation of the evidence when the court found there was no verification as to whether the address used was verified and known to be that of the 1st Respondents. The court's finding could not in view of the above be justified by the evidence on record.

18. In the case of **Ibrahim Musa & Sons Ltd & another Vs. First National Finance Bank & Another [2002] eKLR Civil suit No. 187 of 2001 (Mombasa)** Hon. Justice J.W. Onyango stated:-

"The last point is that statutory notice was not sent as required by Section 74(2) of the Registered Land Act. The law is well settled that where the service is by registration the service is deemed to have been done if sent to the last known address of the Mortgagor. As I have stated above the last known address of the Applicant was P.o. Box 90759 Mombasa. That is not in dispute. That the Notice under Section 74(2) of the Registered Land Act was registered to the Applicants through that address is certain and is not in dispute. It is also not in dispute that it returned after sometime unclaimed. The Applicants have not offered any reasons as to why it was not claimed. The Respondents have shown that the statutory notice was properly served as is required by law. They have annexed registration slip showing that the letter was registered. They have shown that they used the last known address of the Applicant's as is required. The letter was later returned unclaimed and the Applicants say they did not receive it. They do not say that they had ceased at any one time to operate their postal address box number. I thin under these circumstances when dealing with service in respect of property covered by Registered Land Act, I must accept that once the Mortgagee proves that he served the Mortgagor as is required by Section 153 of the Registered Land Act, the court must accept that he has discharged the burden on him in respect of service."

19. In the instant case, the Applicant has discharged his duty by having demonstrated that the statutory notice was sent by a registered post to chargor's last known address and as such the chargee discharged his duty on service as required by law and the burden of proof shifts to the chargor to demonstrate otherwise. In this case the 1st Respondent failed to demonstrate that the address used for service was not his nor the one he had provided to the chargee.

20. The learned trial magistrate found the 1st Respondent had defaulted on his repayment obligation to the Appellant and was at all material times in arrears yet he proceeded to grant the 1st Respondent's application. In view of the fact that statutory notice had properly been served, I am of the view that the learned trial magistrate should not have proceeded to restrain the Appellant from realizing its security given that the secured debt had been proved to be due and outstanding.

21. In the case of **Labelle International Ltd Vs. Fidelity Commercial Bank & Another [2003] 2 E.A 541** at page 544 Hon. Justice

Nyamu, as he then was, held:-

"Thirdly it has not been established that the defendants have calculated interest at a rate outside the contractual documents namely, the charge, the debenture and the letter of offer. It follows therefore as long as the plaintiffs admit Kshs. 8, 635,381-53/- to be due and unpaid an injunction would not lie because the actual amount due is disputed.

It is now established law that when part of the amount claimed is admitted or proved to be due a chargee cannot be restrained by an injunction-see the case of Habib Bank AG Zurich Vs. Pop in Kenya Ltd [1989] LLR 3069 (CAK) and also the earlier authority of Ngiro Vs. Patel."

22. In the instant appeal, it is clear by virtue of the express provisions of **Section 94(4) of the Land Act, 2012** the 1st Respondent's right to redeem the suit property had been extinguished upon its sale in the public auction to the 2nd Respondent; a fact the learned trial magistrate in his ruling appreciated in that the suit property had been sold to the 2nd Respondent in exercise of the Appellant's chargee's statutory power of sale. I find that by virtue of **section 99(4) of the Land Act, 2012**, the 1st Respondent was not, as a matter of law, entitled to an order of injunction; as his remedy, if at all, lies in a claim for damages.

23. In case of **Simon Njoroge Mburu Vs. Consolidated Bank of Kenya Ltd (2014) eKLR** Hon. Justice J. Havelock, stated:-

"As I have detailed above, the Plaintiff lost his right of redemption in relation to the suit property at the fall of the hammer at the public auction held on 6th November 2012. Section 99 of the Land Act, 2012 details the protection to which the purchaser of the suit property at auction is entitled. It reads as follows:-

"99. Protection of purchaser

1. This section applies to-

- a. A person who purchase charged land from the chargee or receiver, except where the chargee is the purchaser; or**
- b. A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the charge if the charge and the person so claiming obtained the charged land in good faith and for value.**

2. A person to whom this section applies-

- a. Is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;**
- b. is not obliged to see to the application of the purchase price;**
- c. Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular;**

3. A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the charger, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

4. A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."

24. Having come to the conclusion that I have, I allow the appeal and propose and make the following orders:-

- a. That the Appeal is allowed.**
- b. That the Ruling and order of the Chief magistrate dated 7th August 2017 be and is HEREBY set aside.**
- c. That the 1st Respondent application dated 8th March 2017 in the Chief Magistrate Court, at Milimani Commercial Court dated 8th March 2017 be and is hereby dismissed.**
- d. That the costs of the Appeal and the application dated 8th March 2017 in the Chief Magistrate Court, Milimiani Commercial Court be and is HEREBY all awarded to the Appellant as against 1st Respondent.**

Dated, signed and delivered at Nairobi this 11th day of October, 2018.

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J .A. MAKAU

JUDGE