



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, TUNOI & PALL, J.J.A.)
CIVIL APPEAL NO. 275 OF 1997
BETWEEN

SAVINGS & LOAN (K) LIMITEDAPPELLANT

AND

FLORA WARUE NYAGAHRESPONDENT

**(An Appeal from the Ruling and Order of the High Court of
Kenya at Nairobi (The Honourable Mr. Justice Mbiti)
dated 12th November, 1996**

in

H.C.C.C. NO. 2754 OF 1996)

JUDGMENT OF THE COURT

In or about 29th June, 1983, Mark N. Mutua, the husband of the respondent, Flora Warua Nyaga, purchased a house situated on Land Reference No. Nairobi/Block 72/1208, hereinafter referred to as "the suit property", from the developers Civil Servants Housing Company Limited with the assistance of a loan of Shs.286,200/= provided by the appellant, Savings & Loan (K) Limited, and secured by a charge in the appellant's favour on the suit property.

It is common knowledge that Mark N. Mutua soon fell into arrears in servicing the mortgage and the appellant in exercise of its statutory powers of sale conferred upon it under the provisions of Section 74 of the Registered Land Act decided to realise the security by sale of the suit property.

The respondent, to forestall the threatened action, filed suit Machakos H.C.C.C. NO. 405 of 1995 (now Nairobi H.C.C.C. NO. 3422 of 1995) against her husband and the appellant seeking an injunction restraining them from alienating or disposing of the suit property; a declaration that she had an interest in the suit property and a determination of her share in it; general damages and costs. On account of this suit, she obtained an ex-parte temporary injunction order to restrain the sale. On 5th February, 1996, the respondent's application for injunction was fixed for inter-partes hearing. However, as neither she nor her advocate appeared in the superior court the application was dismissed with costs. The substantive suit, however, is still pending.

The appellant on 11th March, 1996, once again advertised the suit property for sale. It was sold on 10th April, 1996 and the respondent successfully bid for and purchased it at a going price of Shs.1,780,000/= out of which she paid a deposit sum of Shs.450,000/= at the fall of the hammer representing 25% of the sale price. The balance was to be effected within 90 days of the sale. It came to pass that she failed to raise the balance of the purchase price within the stipulated period and the appellant

purportedly called off the sale and forfeited the deposit. The respondent promptly sued by instituting Nairobi H.C.C.C. NO. 2754 of 1996 and sought the following orders:-

a)A declaration that the sale of the suit property to the respondent pursuant to public auction by the appellant on 10th April 1996 is still valid and effective.

b)Specific performance of the said contract of sale by ordering the appellant to accept the balance of the purchase price and to execute transfer documents in favour of the respondent.

c)An order of injunction restraining the appellant from selling, alienating and or transferring the suit property to any other person or persons whatsoever until the hearing and final determination of the suit.

Simultaneously, the respondent took out a chamber summons seeking a temporary restraining order pending the disposal of the suit. The application was fully heard before Mbitio, J. who in a reserved ruling held that the forfeiture clause in the conditions of sale was a draconian stipulation and that it would be inequitable and unjust for the respondent to lose such a colossal amount of money. The learned Judge further held that the respondent was a joint mortgagor who was in a position to redeem the suit property before the equity of redemption was lost and the court should in all circumstances allow her to do so on reasonable terms. He granted an order for injunction on condition that the respondent pays Shs.30,000/= per month towards the liquidation of the mortgage debt until the secured amount is paid in full or until the suit is finalised whichever is the earlier and in default of any one instalment the appellant to be at liberty to foreclose.

Not surprisingly, counsel for both the appellant and the respondent vigorously attacked this ruling. The appellant's counsel submitted that it was an error on the part of the learned Judge to hold that the respondent was a joint mortgagor and that by consolidating the application before him with Nairobi H.C.C.C. NO. 3422 of 1995 which was not the subject of the application then before him the learned Judge had prejudiced the position of the appellant in the latter suit. Counsel further averred that in the surrounding circumstances no prima facie case with a likelihood of success had been made out by the respondent and consequently she was not entitled to the injunction sought.

Counsel for the respondent did not oppose the appeal and urged us to allow it on the ground that the orders made by the learned Judge had adversely affected the respondent. In any case, counsel argued, the learned Judge had no business determining on issues that the parties did not agree on and were neither raised nor canvassed by any of the parties.

This being an interlocutory appeal and the suit having not been tried in the superior court, many issues still remain unresolved and are yet to be canvassed and a decision taken on them. Thus, we will not at this stage express our views on the pending suits. Having said this, it is obvious from the record that the learned Judge erroneously ventured without jurisdiction onto issues which no one asked him to determine.

He might have been sympathetic to the plight of the respondent but he should not have allowed himself to be carried away with emotion.

On the respondent's own showing, her husband was in breach of the mortgagor's obligations. She does not challenge the appellant's statutory power of sale but knowingly and willingly transformed herself into a purchaser of the suit property. In the circumstances, it is difficult to understand how she can convert her relationship into that of a joint mortgagor. This is one instance which shows that the ruling of the learned Judge is marked by strange proposition.

The respondent did not point out any breach on the part of the appellant in relation to the auction sale and to hold that the loss of the deposit was a draconian loss is not sufficient to entitle one to the remedy of injunction for which one has to firstly, establish a prima facie case with a probability of success, and, secondly, that damages would not be an adequate remedy.

For the reasons above stated, the appeal is allowed. The orders made in the superior court on 12th November, 1996 are set aside and the respondent's application for injunction filed in the said court on 6th November, 1996 is dismissed with costs to the appellant. The costs of this appeal are awarded to the appellant.

Dated and delivered at Nairobi this 8th day of May, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR