



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, TUNOI & LAKHA, JJ.A.)

CIVIL APPEAL NO. 82 OF 1998

BETWEEN

DAIMA BANK LIMITED1ST APPELLANT

KANGETHE & COMPANY2ND APPELLANT

WHITESTONE AUCTIONEERS (K) LIMITED3RD APPELLANT

AND

K. H. OSMONDRESPONDENT

(An appeal from the order of the High Court of Kenya at
Nairobi (Hon. Justice Richard Kuloba) dated 12th
March, 1998

in

H.C.C.C.. NO. 2630 OF 1997)

CONSOLIDATED WITH

CIVIL APPEAL NO. 83 OF 1998

BETWEEN

CONSOLIDATED WITH K. H. OSMONDAPPLICANT

AND

DAIMA BANK LIMITED1ST RESPONDENT

WHITESTONE AUCTIONEERS (K) LIMITED2ND RESPONDENT

(An appeal from the order of the High Court of Kenya at
Nairobi (Hon. Justice Richard Kuloba) dated 12th
March, 1998

JUDGMENT OF THE COURT

These two appeals which have been consolidated for convenient disposal arise out of rulings delivered by Kuloba, J. on 12th March, 1998. The first appellant is a bank and we shall hereinafter refer to it as "Daima Bank". The second appellant is an advocate of the High Court of Kenya practising in Nairobi and acts for Daima Bank. The third appellant is a court broker and an auctioneer. The respondent is also an advocate of the High Court of Kenya also practising in Nairobi.

At the centre of the dispute in this litigation are a mortgage over L.R. No.1/835, Nairobi, and a chattels mortgage created by the respondent in favour of Daima Bank as security for a loan. By the latter the respondent assigned all his moveable assets to Daima Bank to secure the same.

It is not in dispute that the respondent was unable to service the mortgage and soon fell into grave arrears compelling Daima Bank to demand payment of the principal sum together with interest which stood at Shs.43,269,829.15 as at 27th July, 1997 as provided for in the mortgages.

By a plaint dated 21st October, 1997 the respondent avers that the third appellant on two occasions invaded his premises accompanied by about 30 people and armed askaris. They proceeded with superior force to remove furniture and other of his possession including tools and implements necessary for the performance by him of his profession and loaded them on to their vehicles and took them away. This was allegedly done in full view of many people. Though the respondent admits the existence of the chattels mortgage he contends that it was void and of no effect since it was neither witnessed, dated, stamped nor registered. Consequently, he averred, the attachment of his moveable assets was illegal. He sought against the appellants damages for unjustified invasion of his premises, loss of privacy, defamation and the return of all his goods.

On the same day of filing plaint the respondent moved the superior court for an *ex parte* injunction which he obtained on the following day. The inter partes hearing was scheduled for 30th October, 1997 but was adjourned on several occasions until 28th January, 1998 when it was heard and concluded. In the meanwhile on 6th November, 1997, the three appellants filed a written statement of defence in which they traversed seriatim the averments in the plaint. Daima Bank also counter-claimed for Shs.44,919,216 together with interest at the rate of 4% per month from 30th September, 1997 until payment in full allegedly in respect of an account of overdraft and loan facilities granted to the respondent.

On 10th November, 1997 the second and the third appellants on behalf of Daima Bank served upon the respondent a notification of sale by public auction of the respondent's property, i.e. L.R. No. 1/835, for 9th December, 1997. To forestall the auction sale, the respondent promptly sued and immediately thereafter obtained an *ex parte* injunction. In the plaint dated 2nd December, 1997, the respondent averred, firstly, that the notification of sale was invalid, and; secondly, that the mortgage created over the property was null and void and also invalid. The written statements of defence and a counter-claim were, in like fashion, lodged. In the main they traverse the respondent's claims and state that the respondent was in breach of the terms of the letters of offer and also of the mortgage instruments.

The learned Judge heard the applications separately. In reserved rulings he observed that the pleadings as filed disclosed disputed facts and law which made the controversy so focused on such a diversity of questions going beyond affidavit materials and interlocutory arguments and that to attempt to resolve the conflict at that stage would prejudice the parties. Such disputes to be resolved, the learned Judge observed, concerned the validity of the mortgages.

As to the property, the learned Judge thought that it was a prime land which was fully developed and should not be lost by public auction before the disputed aspects of the suit were determined. He consequently granted the orders for injunction.

On appeal to us, Mr. Njuguna counsel for the appellants, submitted in the main, though accepting that there were serious issues to be canvassed at the trial, that the learned Judge was wrong in acceding to the applications for injunctions by the respondent despite the obvious fact that the respondent had borrowed the money from Daima Bank and was unable to repay it. Moreover, Mr. Njuguna argued, it had not been proved that damages were not an adequate remedy. He submitted that in granting the injunctions the learned Judge did not apply the correct test and consequently reached an erroneous conclusion in law since the injunctions should never have been issued at all.

With respect, we cannot see the basis of this submission. It is firmly established that this Court will not interfere with the exercise of a discretion by a Judge unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice -- See *Mbogo & Another v Shah [1968] E.A. 93*.

For our part, we are not prepared to hold that the learned Judge was wrong when he held in favour of the respondent. The learned Judge had before him, first, an allegation that the mortgages, the very foundation upon which the suits and the counterclaim rested were invalid and of no effect. That allegation, could not, as pointed out by the learned Judge, be rebutted by the affidavit evidence. Secondly, that the interest charged on the principal sum was not only unreasonable but also unconscionable and manifestly excessive.

We are satisfied that the learned Judge considered these aspects of the matter and correctly exercised his discretion in favour of the respondent as these allegations had not been tried nor a decision made on them.

It follows that in our view these appeals fail and are hereby dismissed with costs.

Dated and delivered at Nairobi this 19th day of October, 1998.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR