



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civil Appeal 202 of 1996

JAMES OMBERE OCKOTCH
APPELLANT

AND

1. EAST AFRICAN BUILDING SOCIETY

2. C. B. MISTRI

3. MR. M. YOUNG.....
RESPONDENTS

(Appeal from the Dismissal Order of the High Court of Kenya at Nairobi (Hon. Justice J. L. A. Osiemo) dated 21st March, 1996

IN

CIVIL CASE NO. 5049 OF 1989)

JUDGMENT OF THE COURT

By a charge dated 5th October, 1978 the appellant charged his property known as L. R. NO. 12144/9 situate in the Langata area of Nairobi together with the buildings and improvements erected and being thereon (hereinafter referred to as the suit property) to the first respondent (hereinafter referred to as “the building society”) to secure a loan of shs. 500,000/= made by the building society to the appellant. The charge was duly registered against the title of the suit property on 7th October, 1978.

The appellant was to pay off the principal sum advanced interest by monthly instalments of Shs. 6,120/=.

We must bear in mind that his appeal is against the refusal by the learned judge to restrain the building society, the second respondent auctioneer and the third respondent (hereinafter called the “the purchaser”) “from proceeding with the purported sale and/or from effecting any transfer of the land known as L. R. NO. 12144/9, Langata Road, Nairobi together with improvements thereon or from doing anything in purported performance of the purported sale of the said property on the 26th October, 1989,until the final disposal or determination of this suit”.

To be entitled to such an injunction as was sought the appellant had to establish, firstly a prima facie case with a probability of success, and, secondly, that he would have suffered irreparable injury should the

injunction not be granted.

Unfortunately we do not have the benefit of a full discourse on the issues raised before the learned judge. The learned judge in an embarrassingly brief conclusion simply stated:-

“I have had opportunity to go through the plaint filed by the plaintiff the defences filed by the 3 defendants and their supporting affidavits. I have also had the opportunity to listen to the submissions by counsels (sic) for the plaintiff as well as those for the defendants. The plaintiff charged his said property L. R. No. 12144/9 in favour of the 1st defendant as security for Shs. 500,000/= He defaulted and the 1st defendant exercising his (sic) statutory power of sale requested the second defendant an auctioneer to sell the same by public auction which the 2nd defendant did and 3rd defendant did bid for the same and bought the property as bona fide purchaser”.

We could with respect point out that the learned judge ought to have considered more fully the issues raised by the counsel in the superior court. As the learned judge did not so it falls to us to consider those issues.

It was conceded by Mr. Wamalwa that the appellant was, at the time of the auction sale, in arrears of payments of principal sum as well as interest for more than two months. The first point to be decided by the learned judge was whether or not a statutory notice was pre-requisite to the auction sale. The title of the suit property is registered under the Registration of Titles Act (Cap 281, Laws of Kenya). The suit property is therefore governed by the relevant provisions of the Transfer of Property Act of 1882 of India as applicable to Kenya. Section 69A of that Act regulates the exercise of a mortgagee’s statutory power of sale. That section where relevant reads:-

69A (1) A mortgagee shall not exercise the mortgagee’s statutory power of sale unless and until:-

- (a) notice requiring payment of the mortgage money has been served on the mortgagor on one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
- b) Some interest under the mortgage is in arrears an unpaid for two months after becoming due; or
- c)
- d)

I can be seen straight away that under section 69 A (1) (b) there is no need for the giving of the three month statutory notice when interest for more than two months is due and unpaid . On this issue, therefore, the appellant did not have a prima facie case with any probability of success. If the appellant felt really aggrieved by the default in giving of the statutory notice he ought to have moved the court soon after 3rd August, 1989, to stop the proposed sale. This simply could have been a step taken to avoid the predicament the appellant now finds himself in.

It is also noteworthy that despite having been warned in writing in December, 1988, that the appellant was in arrears and that legal action could be taken unless the arrears were paid up within three weeks thereafter, the appellant did nothing to clear those arrears, save for making further half-hearted attempts to sub-divide the suit property.

The right of sale having arisen in favour of the building society, it put up the suit property for sale. We agree with Mr. Wamalwa when he urged that the mortgagee does owe a duty of care to the mortgagor. However the mortgagee is not the mortgagor’s trustee. The Mortgagee’s duty is to obtain the best price available at an auction sale which obviously is a forced sale.

Mr. Wamalwa placed great reliance on section 43 of the Building Societies Act, cap. 489, laws of Kenya to argue that a building society owes a greater duty of care tot he mortgagor than any other mortgagee.

This section reads:

“43 (1) A building society exercising its power of sale of any land mortgaged to it shall take reasonable care to ensure that in the exercise of the power the price at which the land is sold is the best price which can reasonable be obtained; any agreement if and so far as it relieves or may have the effect of relieving a society from the obligation imposed by this section shall be void”.

This sub-section reproduces in substances the English rule that the mortgagee must sell in good faith and at a reasonable price. Reference is made to this rule in the case of Sojabi v. Amreliwalla & another [1956] EACA 71 which will be referred to hereinafter.

The building society obtained, what was referred to by Mr. Wamalwa as a worthless piece of paper, an opinion of a valuer, as regards what would be the value of the suit property at a forced sale. A valuer, Mr. Mr. W.D. Armstrong put such value at Shs. 1,650,000/= in August, 1989. The property fetched, nevertheless, Shs. 2,700,000/- the first two bids of shs. 2,900,000/= and shs. 2,800,000/= having failed or been rejected as the bidders could not raise the deposit of 25% of the suit amount bid. The appellant did not produce any 1989 Valuation of the suit property. He merely stated that the suit property was worth shs. 7,000,000/=. That was not enough to enable a court to say that the suit property was sold at a price which could amount to fraudulent undervalue. At any rate it appeared that the appellant was content to say that he would have been happier if the suit property was sold at shs. 2,900,000/= On this issue also, therefore, there was nothing before the learned judge to enable him to make the injunction orders sought.

During the year 1985 the appellant sought and obtained the building society's consent to sub-divide he suit property into two portions and the building society agreed in principle to release the sub-divided (but not the built up part of the property) part of the land from the existing security. Whilst the building society had agreed to so release a portion of the suit property no documentation to this effect came into existence and the status quo before the proposed sub-division continued to exist. There was no evidence before the superior court to show that the actual sub-division took place by way of issuance of new title documents. The charge in question remained as it was and the appellant continued to pay the instalments as originally agreed until 1988 or thereabouts when the appellant fell into arrears as regards both the payment of the principal sum and interest.

By its letter of 3rd august, 1989 addressed to the second respondent (hereinafter referred to as “the auctioneer”) the building society instructed the auctioneer to put up the suit property for sale by public auction on 26th day of October, 1989. This letter was copied to the appellant who admittedly received it. Prior thereto the appellant had, on 12th May, 1989, instructed his surveyors to sub-divided the suit property into nine (9) plots. The surveyors presented to the Director, City Planning and Architecture, City Counsel of Nairobi, on or about the 30th day of August, 1989 a proposed sub-division plan of the suit property. What became of the proposed sub-division plan as submitted is not known. But here again, the original mortgage was not affected and the status quo before the proposed sub-division continued to exist.

Mr. Wamalwa for the appellant argued that the building society, having ceded and/or freed or having agreed to cede and/or free two acres of the suit property from the mortgage, was estopped from exercising its power of sale. If we understood Mr. Wamalwa correctly his argument was that the building society ought not to have put up the suit property for auction whilst the appellant was in the process of sub-dividing the suit property to raise moneys from the proposed sub-divisions. We do not find evidence o record to suggest, even remotely, that the building society had made any such representations as to create an estoppel of the nature which Mr. Wamalwa valiantly attempted to establish.

The appellant's further contention was that the acceptance of the third bid by the auctioneer vitiated the auction sale and that therefore the auctioneer ought to have cancelled or postponed the sale. It is common knowledge that many bidders cannot raise the require 25% of the price bid and hence the conditions of sale stipulate, in some instances, as was the case here as follows:

‘1. Subject to a reserve price the highest approved bidder shall be the Purchaser, the Auctioneer having the right to refuse any bid.’.

The other bidders, namely Messrs. Martin Onyango Obwogoh and Bartholomew Beda Ongamo both were not ready with the payment of 25% of their respective bids at the fall of the hammer. For that reason the auctioneer accepted the third highest bidder's (the purchaser's) offer. Instead of paying 25% of the sum of Shs. 2,700,000/= in cash or by banker's cheque the purchaser, with concurrence of the auctioneer, obtained and gave an undertaking of payment from his advocates Messrs. Hamilton Harrison and Mathews. The auctioneer accepted this undertaking after he was shown no evidence either by Mr. Obwogoh or Mr. Ongamo of their respective ability to immediately pay 25% of their bids. The memorandum signed by the auctioneer and the purchaser, on the 26th day of October, 1989, shows that the purchaser did pay the sum of Shs. 675,000/= on the very day of the auction.

The auctioneer having accepted having accepted the bid which he approved did what he was required to do, namely to accept the highest approved bid.

In these circumstances we do not think the auction sale was vitiated.

Mr. Wamalwa took exception to the manner in which the auctioneer and the purchaser went into the auctioneer's office to finalize the document (memorandum) of sale. He argued that the manner in which the auctioneer acted indicated collusion between the auctioneer and the purchaser. To support his argument he relied on the letter addressed by Messrs. Hamilton Harrison and Mathews to the auctioneer. With the greatest of respect to Mr. Wamalwa we see no conclusion as suggested. A purchaser normally does not go loaded with cash or armed with a banker's cheque for the exact amount that he may be required to hand in at the fall of the hammer. He arranges immediately to pay or to cause to be paid. One cannot know at what price the auction property will be knocked down. We do not think the allegations of collusion stand up to scrutiny and it is trite that in order to vitiate a sale on ground of collusion there must be ample acceptable evidence.

Mr. Wamalwa relied on a passage in the case of Sojabi (supra) at page 73 which reads:-

"The English rule that, although a mortgagee in selling is not a trustee for the mortgagor, he must sell in good faith and a reasonable price, applies in Uganda. It obviously requires that a mortgagee must not take a lower price than he knows to be obtainable. It also, I think, leads to the conclusion that if the mortgagee acts in secret and conceals what he is doing from the mortgagor, he may expose himself to some suspicion of not having acted in good faith. This suspicion must at least be increased if the mortgagee sells in secret with knowledge that the validity of his notice of sale is challenged on grounds not prima facie unreasonable."

In the SOJABI case the facts established that the mortgagee and the purchaser acted in collusion. In this case, there is no evidence that the auctioneer or the mortgagee acted in collusion with the purchaser. The purchaser was the highest approved bidder. There was no evidence before the learned judge to show any such collusion as Mr. Wamalwa would want us to find so as to vitiate the sale.

The purchaser acquired title to the suit property upon the fall of the hammer, subject of course to the payment of the price. When the Transfer of Property Act of 1882 of India as applied in Kenya was amended by Act No. 19 of 1985 the mortgagor's right to redeem stood extinguished upon a contract of sale coming into existence after an auction sale or private contract.

The proviso to section 60 of the Transfer Property Act expressly provides as follows:

"Provided the right conferred by this section has not been extinguished by act of the parties or by order of a court and is exercised before the mortgagee has, under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property".

This proviso as read with the section clearly shows that the mortgagee's right of redemption stands extinguished upon the coming into existence of a binding contract for sale of the mortgaged property and which contract in this case was entered into on the 26th October, 1989. This only goes to show that the learned judge in the circumstances of this case could not have granted an injunction which could have

annulled the sale. There was no evidence before him to enable him to do so.

What then is the position of the purchaser? Here the title of the purchaser cannot be impeached in terms as shown in section 69 B(2) of the Transfer of Property Act. This sub-section reads:

“(2) Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

- (a) That no case has arisen to authorize the sale; or
- (b) That due notice was not given; or
- (c) That the power was otherwise improperly or irregularly exercised,

and a purchaser is not either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly authorized; but any person damnified by an unauthorized, or improper, or irregular exercise of power shall have his remedy in damages under the person exercising the power.”

The wording in this section is so explicit that we cannot but agree with Mr. Oyatsi when he argued that if at all the appellant had any remedy it was in damages and not by way of injunction. We note that the appellant does not claim damages. It is now seven years plus after accrual of the cause of action. It is doubtful if the appellant can now substitute or add a cause of action in damages. But that is a matter for the appellant to decide.

Although the learned judge did not give sufficient consideration to the facts and law applicable he correctly came to the conclusion that he could not properly grant the injunction sought.

The learned judge, however, went further and ordered that as the sale was proper the transfer should be effected to the purchaser. Whilst it could be said that the refusal to grant the injunction sought would have resulted in an eventual formalization of the transfer to the purchaser the learned judge had no mandate to make that order. We are informed (from the bar) that such transfer has already taken place . Whilst it would be futile now to reverse that portion of the learned judge’s order which effectively orders transfer to the purchaser we would want to point out that the superior court should confine itself to the application before it and rule thereon only.

The upshot of all this is that this appeal is dismissed with costs payable by the appellant to all the respondents. It is so ordered.

Dated delivered at Nairobi this 4th day of July, 1997.

A.M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR