



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, LAKHA, J.J.A. & BOSIRE, AG.J.A.)
CIVIL APPEAL NO. 60 OF 1997
BETWEEN
FRANCIS MOGAKA MARANYA.....APPELLANTS
AND
NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT
WESTERN TRUSTEE LIMITED.....2ND RESPONDENT
(An appeal from the Judgment of the High Court of Kenya at
Nairobi (Justice Kuloba) dated 14th February, 1996
in
H.C.C.C. NO. 1924 OF 1986)
JUDGMENT OF THE COURT

The plaintiff appeals to this Court from a judgment of the superior court (Kuloba, J.) given on February 14, 1996 whereby he awarded to the plaintiff general damages in the sum of K.Shs.380,000/= interest thereon and costs.

By his amended plaint dated and filed on April 26, 1994 the plaintiff claimed against the defendants (respondents) a declaration that a sale by private treaty of certain property referred to as Plot No. MN/1/124 Mombasa (the property) effected by the first respondent (the Bank) in purported exercise of its statutory powers as chargee of the property, was unlawful and irregular and therefore a nullity. There was also a claim for damages.

On or about October 19, 1981, the plaintiff as a registered proprietor of the property charged his interest therein in favour of the Bank to secure a sum of K.Shs.120,000/= lent by it to the plaintiff. There was a power of sale in accordance with Section 69 of the Transfer of Property Act (the Act) in case of default as admittedly there was.

The plaintiff claimed that the Bank having advertised the property for sale by public auction was not entitled, in law, to sell of the said property by a private treaty as in fact it did. The learned Judge held that the sale was therefore wrongfully conducted and awarded general damages to the plaintiff in the sum

which was equivalent to what the private sale to the second respondent fetched, namely K.Shs.380,000/=.

Against that decision the appellant complains mainly on two grounds: first, that the purported exercise of power of sale was wrongful and irregular and, secondly, that the learned judge erred in his assessment of damages. The Bank cross-appealed and mainly argued that the right to a sale by private treaty conferred by Section 69 of the Transfer of Property Act was available to it notwithstanding the notice of advertisement of sale by public auction. In the event, no claim for damages can be sustained.

We have carefully considered the respective and rival contentions of the parties. Logically, the first question to be considered is whether the purported sale was lawful or irregular. In this regard, the provisions of Section 69 of the Act are clear and entitle the Bank to effect sale by private treaty. This right, in our view, is not taken away merely because at an early stage, the Bank had advertised to sell the property by public auction. There was no plea of estoppel nor can one succeed as there is no estoppel against the statute. Mr. Kowade for the appellant eventually conceded and, in our view rightly, this ground of appeal and abandoned it.

If the sale was not to be impeached on this ground, as we so hold, it follows that no award of damages resulting from the sale of the property can be sustained. The question, therefore, of an erroneous assessment of damages does not arise.

In the result, the appeal fails and is dismissed with costs. The cross-appeal succeeds and is allowed with costs.

The decree of the superior court dated February 14, 1996 is set aside and we substitute therefor an order dismissing the plaintiff's suit in the superior court with costs.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR