



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: GICHERU, TUNOI, J.J.A. & BOSIRE, AG. J.A.
CIVIL APPEAL NO. 156 OF 1997

BETWEEN

J. M. MWAKIO.....APPELLANT

AND

KENYA COMMERCIAL BANK LTD.....RESPONDENT

**(Appeal from a ruling of the High Court of Kenya at Nairobi
(Pall J) dated 26th July, 1995**

in

H.C.C.C. NO. 2815 OF 1980)

JUDGMENT OF THE COURT

This is an appeal from the order of the superior court (Pall, J. as he then was) given on 26th July, 1995, whereby he declined to grant the prayers sought by the appellant pursuant to his application by summons dated 14th March, 1994, which was dismissed with costs.

In the application the appellant prayed for orders, inter alia:-

"1.That the possession of L.R. NO. 8707/7 on 30/9/1992 on purported Civil Case 4699/89 was in violation of Court of Appeal injunction orders of 10/10/85 and 29/4/88 on this case.

2.That the sale documents were fraudulent.

3.That purported Civil Case 4699/89 was filed with intent to dodge the provisions of the above mentioned injunction orders and was contrary to Sections 43 and 44 of CAP 80.

4.That until the injunction orders of the Court of Appeal mentioned at (1) above were discharged any efforts to sell L.R. NO. 8707/7 were null and void.

5.That the secret sale of L.R. NO. 8707/7 on 15/10/1993 to Augustana Academy Company Ltd. by the Kenya Commercial Bank was null and void and that Augustana

Academy Co Ltd was aware that the sale was unlawful."

The appellant in addition thereto petitioned the Court to declare the sale of his house L.R. NO. 8707/7, Nairobi, hereinafter referred to as the suit property, null and void, that the title now held by Augustana Academy be cancelled, discharged and handed over to the appellant; and; that the sum of KShs.2,850,000/= realised from the auction sale be paid back to him. Finally, that Augusta Academy be evicted from the suit property.

Reduced to its appropriately bare essentials, the ruling of the learned judge complained of is that Civil Appeal No. 147 of 1986 having been heard and determined on 16th June, 1988, the interim injunction orders granted on 10th October, 1985 and 29th April, 1988 fell by the wayside and were spent and, thus, the respondent was thereafter at liberty to exercise its power of sale, which it did, over the suit property and as there were no valid injunctive orders in force when the suit property was sold on 30th September, 1992 the application was unmeritorious, vexatious and an abuse of the process of the Court.

We would now turn to describe the background circumstances leading up to the appeal before us. We must confess that the facts of the matter are now familiar to us and indeed to almost all the Judges of both the Appellate and the superior courts, the appellant having filed myriads of applications and suits as from 1980. We note that his litigation revolves solely around the suit property, and; not only has the appellant fought his cause without counsel, but has also topped it with ill advised correspondence to Judges and other prominent personalities in the country. The volume of his pleadings normally runs to several hundred pages with acrimonious comments on the margin. The appellant is a familiar figure in the Law Courts. He does not hesitate to institute litigation on any aspect of perceived breach of his rights. Of course he is indeed perfectly free to bring any number of suits he may so desire, but he must understand that in doing so, he is bound to stick to the rules governing the conduct of litigation in our courts.

This court in Civil Appeal No. 147 of 1986 (Platt, Apaloo & Masime, JJ.A.) established the facts of the case as follows. The appellant is a former senior civil servant. Sometime in June 1974, the respondent bank granted him a loan to finance the purchase of the suit property. He was granted a loan of KShs.170,000/= repayable by 144 equal monthly instalments of KShs.1,895/=. He duly bought the suit property and mortgaged it to the respondent. In July 1977, when some unspecified part of the house loan was outstanding, the appellant again successfully sought further finance from the bank to enable him finance a poultry project. So what was a "house loan" was converted into a commercial overdraft and the self-same suit property was agreed to stand as continuity security for due repayment of the enhanced facility. Instead of the KShs.1,895/=:, the appellant now agreed to pay off the loan and interest by an enhanced and a staggering monthly instalment of KShs.14,000/=: . This, in earnest, was the cause of the appellant's unending woes leading to the eventual loss of the suit property when the respondent exercised its power of sale. It would appear that the appellant's poultry project became an unviable venture, and consequently, the appellant was not able to meet the agreed repayment of the instalments or indeed any part of them, when they fell due then or indeed since. So, as was to be expected, the respondent served on the appellant notice that if the default continued, the respondent would exercise its statutory power of sale. In response, the appellant commenced an action against the respondent by filing H.C.C.C. NO. 2815 of 1980. The plaint, as amended in November, 1984, sought judgment against the respondent for, inter alia:

- 1.A declaratory order that the respondent has violated the contract;
- 2.That the correct debt on the mortgage contract be determined;
- 3.That the whole indebtedness be written off for abuse of the appellants securities as provided in law and as argued in Court of Appeal;

4. That damages be awarded as recorded by the Court of Appeal to include tax element and injury to appellant's feeling ...;

5. That separate damages be awarded for illegal control of appellant's property; and

6. That damages be awarded for illegal caveat.

To this the respondent filed a written statement of defence. It contended in the main that as the appellant was in arrears and the respondent having given a valid notice to exercise its statutory power of sale, the suit lacked merit.

When the matter was pending for hearing before the superior court, the appellant sought injunction and a number of orders. These were either not granted or orders were made to which he took exception. So he brought a number of interlocutory appeals and motions before this Court. These were heard and disposed of.

In a full and well-considered judgment, Porter, J. held and concluded that as at 20th March, 1980, the appellant owed the respondent KShs.370,000/= and was in default and in contravention of the mortgage agreement. The learned Judge dismissed the suit with costs. Not surprisingly, the appellant promptly appealed. In a fairly lengthy judgment which considered all the facts, the issues involved and the law, this Court (Platt, Apaloo & Masime, JJ.A.) in Civil Appeal No. 147 of 1986, aforesaid, thought the grounds of appeal in the appellant's memorandum of appeal ill conceived together with the oral contentions founded on them. It concluded:

"The plain truth of the matter, as it seems to us, is that the appellant who is and has been unable to pay his just debt, has used the machinery of the Court to postpone, what to him, must be the day of reckoning. That day has now come and we have a duty to tell him so and in plain terms. Our conclusion is, that this appeal has no merit and should be dismissed with costs."

The judgment is dated and was delivered on 16th June, 1988.

That was not to be the end of the matter for the appellant once again brought a series of applications, too numerous and unnecessary to burden this judgment with their reproduction and in any case, they have no bearing on this appeal. However, in the Court of Appeal Civil Application No.187 of 1988, the ruling of which was delivered on 13th February, 1989, the appellant was bluntly told that this court had no jurisdiction to do anything more in respect of the suit property. He was "advised to come to terms with the bank."

In this appeal the appellant has preferred 47 grounds of appeal the combined effect of which together with his submissions before us is, firstly, that the learned Judge, Pall, J. (as he then was) did not accord the appellant full opportunity to ventilate his case before him; and, secondly that this Court in Civil Appeal No. 147 of 1986 misapprehended the matter before it and that since the defined issues were not conclusively determined we should recall, review and set aside the judgment which, to the appellant, appeared manifestly wrong.

The application before the superior court, as well as this appeal, are nothing but subtle attempts by the appellant to re-open the matter of the sale of the suit property. The suit was heard and determined by the superior court. An appeal against its judgment was heard and determined by this court in its judgment given on 16th June, 1988. We cannot sit on appeal against our own judgment for there is no power for a court to sit on an appeal against itself in the same proceedings. As was said in *LAKHAMSHI BROS V RAJA & SONS* [1966] E.A. 313 at p.315:

"This Court is now the final Court of Appeal and when this court delivers its judgment, that judgment is, so far as the particular proceedings are concerned, the end of the litigation. It

determines in respect of the parties to the particular proceedings their final legal position, subject, as I have said, to the limited application of the slip rule."

The appellant, no doubt, lost a substantial property. The loss arose out of operation of the contract of mortgage freely executed by him and the respondent bank. We should not be seen to lack sympathy for him. But, no consequence that flows out of the enforcement of law can be said to cause injustice.

Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation.

The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts. This appeal is indeed vexatious and amounts to an abuse of the process of the court. We dismiss it with costs.

Dated and delivered at Nairobi this 5th day of December, 1997.

J. E. GICHERU

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

S. E. O. BOSIRE

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR