REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPEAL 148 OF 1995

NYANGILO OCHIENG

OBEL OMUOM…….....APPELLANTS ...

AND

FANUEL B. OCHIENG

GLADYS OLUOCH

KENYA COMMERCIAL BANK LTD.....….....RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Kisii (Mr. Justice Mbaluto) dated 15th September, 1994,

IN

H.C.C.C. NO. 238 OF 1986)

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JUDGMENT OF THE COURT

This appeal involves a long standing dispute regarding two parcels of land known as SOUTH SAKWA/KOGELO/566 (belonging to the first appellant and SOUTH SAKWA/KOGELO/525 (belonging to the second appellant) - hereinafter collectively referred to as "the suit properties".

In or about July, 1979 the first respondent prevailed upon the appellants to hand over to him the title documents of the suit properties to enable him to obtain a loan from the third respondent for which purpose the said title documents were to be used as security.

When this appeal came up for hearing Mr. P.J.O. Otieno for the appellants abandoned ground four (4) in the memorandum of appeal in the face of objection by Mr. Orora for the third respondent (the bank) as to non-inclusion in the record of appeal exhibits numbered 2, D, F and L in the superior court. Those exhibits would have been necessary if the said ground 4 was to be argued. On that basis we allowed Mr. Otieno to argue the appeal.

The first ground of appeal reads thus:

"The learned judge erred in law and fact in failing to determine whether the plaintiffs properly executed any charge in favour of the 3rd defendant (third respondent here) denied having signed any documents

and considering that the plaintiffs are illiterate".

This ground of appeal does not stand any scrutiny. Although no charge documents were exhibited in the court below there can be no doubt that the bank would not have advanced a loan without such security. It is clear that the bank purported to exercise its statutory power of sale only on the basis that the suit properties were charged to the bank for loan facilities given to the first respondent on the strength of the title documents. This situation is further clarified by the appellants' own pleading in paragraph 6 of the amended plaint which reads as follows:

"That on or about July, 1979 the plaintiffs pleaded their land certificate Nos. SOUTH SAKWA/KOGELO/566 and 525 as security to assist the defendant No. 1 acquire loan from Bank herein defendant No.3".

The appellants did not file a defence to the counter-claim made against them by the second respondent whereby the second respondent had pleaded as follows:

"6. That by their own pleadings contained in paragraph 6 and 7 of the amended plaint, the plaintiffs (the appellants here) charged their properties under the provisions of Cap. 300 Laws of Kenya to secure a loan granted to the first defendant by the 3rd defendant and further guaranteed the repayment of the said loan".

Despite what Mr. Otieno urged before us we are not persuaded that there was no properly executed charge in favour of the bank but in agreement with learned judge we hold that there were properly executed charges over the suit properties to secure repayment of the loan.

The second ground of appeal argued by Mr. Otieno merits our anxious consideration. The appellants had pleaded that they did not receive any statutory notice or notices calling upon them to pay the loan sum in default whereof the bank would proceed to exercise its statutory power of sale. It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered Land Act (Cap.300, Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargors receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale.

The appellants stated, in the plaint, that they did not receive any statutory notice of notices. This averment should have put the bank on guard.

It is for the chargee to make sure that there is compliance with the requirements of s.74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.

Miss Awino, for the second respondent, and Mr. Oraro, for the third respondent, have argued that the learned judge correctly found that statutory notices were received by the appellants at P.O. Box 120, SARE which is the last known postal address of the appellants. There is no doubt that address is the last known postal address if the appellants but it must be understood that in the face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting.

It would have been a very simple exercise for the bank to produce a slip or slips showing proof of posting of the registered letter or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is conteplacted by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.

Mr. Charles Manono Magachi (DW3) who worked for the bank at the material time simply produced his file copies of the notices allegedly sent by M/s Hamilton, Harrison and Mathews, the bank's advocates. As pointed out earlier it was incumbent upon the bank to, at least, prove posting of the registered letter or

letters containing the statutory notice or notices.

It is quite possible that such notices were sent but that fact, in the face of denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was, as the learned judge has pointed out, in the judgment, "the villain in the matter".

In the absence of proof of such posting we are constrained to hold that the sale by auction was void. We think that the learned judge, with respect, fell into error and misdirected himself when he held that the notices were sent to their correct address on the supposition alone that the postal address of the appellants was P.O. Box 120, SARE.

Having held that the auction sale was void we must consider the consequences. Miss Awino argued that Section 77(3) of the Registered Land Act gives her client a good title. That sub-section reads:

"(3)A transfer by a chargee in the exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising such power".

Miss Awino also referred to Section 39 of the Registered Land Act in aid of her argument to the effect that her client was, as a bona fide purchaser of value, not bound to inquire into the propriety of the source of the statutory notice. With respect Section 39 does not help her. That section assists all who deal directly with the proprietor of the land. Such a person is not obliged to find out how the proprietor obtained his title if he has a registered title. Equally, that section protects such a person against seeing to the application of any consideration or part thereof; and again, equally that section does not oblige such a person to make a search for any title relating to that land Chapters 283, 280, 282 and 281 of Laws of Kenya.

In our view, a sale which is void does not entitled the purchaser at such sale to obtain proprietorship or title to the land so sold. It is therefore clear that the second respondent did not acquire proper titles to the suit properties. Her remedy is against the bank primarily to obtain a refund of the consideration paid.

The third ground of appeal as argued by Mr. Otieno has already been covered by us in what we have said heretofore.

In coming to the conclusion, we have reached, we cannot but entertain the view that the bank ought to have been more careful in proving service of the statutory notices. Failure of no such proof has resulted in an innocent purchaser for value being deprived of the title to the suit properties.

Consequently we allow this appeal with costs here and below and we order that the Status Quo at present, be maintained until the charge registered in favour of the bank as against the appellants is restored. It is also ordered that the charge registered in favour of the bank against the second respondent be de-registered. The effect of all this is that the charge registered in favour of the bank as against the appellants will be restored on the Register and it will be for the appellants to redeem the suit properties if they so wish. To leave no room for doubt we direct that the appellants will remain liable for payment of interest accrued on the loan to the date of redemption.

Dated and delivered at Kisumu this 21st day of June, 1996.

J.E. GICHERU

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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