



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO.121 OF 1995

BETWEEN

FLORICULTURE INTERNATIONAL LIMITED.....APPELLANT

AND

1. CENTRAL KENYA LIMITED

2. TRUST BANK LIMITED

3. TRUST FINANCE LIMITED

4. FIRST NATIONAL FINANCE LIMITED.....RESPONDENTS

(An appeal from the ruling and order of the High Court of Kenya at Nairobi (the Hon. Justice Andrew Hayanga) dated 7th July, 1995

in

H.C.C.C. NO. 1597 OF 1994 (O.S.)

JUDGMENT OF THE COURT

This is an appeal with leave of the superior Court from its Ruling and order (Hayanga, J.) given on July 7, 1995 whereby he granted leave to amend the Originating Summons, ordered consolidation of three pending interlocutory applications and made Floriculture International Ltd (the appellant) and First National Finance Ltd (the fourth respondent) third and fourth defendants respectively in the suit before him.

The proceedings to which this appeal relates commenced by way of an Originating Summons dated April 26, 1994 in which the plaintiff (the first respondent) sought, inter alia, to have two charges dated June 4, 1993 and June 17, 1993 on Land Reference No. 7705/2 Thika Municipality (the property) in favour of the second and third respondents respectively declared invalid; cancellation by the Registrar of Title of the said two charges, delivery forthwith of the original title; and general damages to be assessed by the Court for irregularly causing the registration of the two charges.

The first respondent was the registered proprietor of the property vide a transfer registered on May 3, 1985 from Gatumaini Farm Limited for a consideration of K.Shs.2.5 million. In the same year, it charged the property to the Agricultural Finance Corporation to secure a loan for KShs.3 million. This charge was

discharged by a Discharge of the Charge which was registered on June 17, 1993 but on the same day a charge in favour of the second respondent to secure an advance of KShs.15 million and another charge in favour of the third respondent to secure an advance of KShs.30 million were registered against the title to the said property. By a transfer dated April 28, 1995 and registered on May 2, 1995 the second respondent by virtue of chargee's power of sale transferred the property to the appellant who created a charge in favour of the fourth respondent. These two further transactions became the subject of the amended Originating Summons. It was the first respondent's case that the charges registered on June 17, 1993 are invalid having been made without its authority and for want of execution by it, and it, therefore, instituted proceedings by way of an Originating Summons claiming reliefs as above set out and that the subsequent transfer and charge were also invalid, inter alia, for want of chargee's power of sale and fraud respectively.

Mr. Inamdar for the appellant has complained to this Court that none of the reliefs sought in the prayers of the Originating Summons fell within the ambit or purview of Order 36 rule 3A of the Civil Procedure Rules under which the Originating Summons was taken out. Order 36 rule 3A reads as follows:-

"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee."

Having carefully considered the terms of this rule, we are satisfied that Mr. Inamdar's complaint is well founded.

The very provisions of Order 36 rule 3A are predicated upon there being a valid mortgage and the reliefs specified in that rule are also predicated upon there being a valid mortgage. In the instant appeal, the plaintiff's main claim was that there was no valid mortgage. This is not a matter upon which an Originating Summons can be based. What is more disturbing is that despite the case of Kenya Commercial Bank Ltd vs. James Osebe (1982-88) 1KAR 48, which the learned Judge himself set out in his ruling, where it was clearly held that there was no power to award damages on an Originating Summons, this was the very relief which the Originating Summons contained and the Judge entertained it. In our judgment there was no valid basis to take out the Originating Summons under Order 36 rule 3A.

It is now well established that the Originating Summons procedure is available only in a limited number of cases specially provided and the procedure is designed to deal with simple matters which may be decided by the Court without the expense of bringing an action and was not intended for determination of matters which involved a serious question on contested facts.

We, therefore, find that there was no jurisdiction to entertain the Originating Summons as taken out and it ought to have been struck out.

While Miss Martha Karua for the first respondent conceded and, in our opinion properly, that the Superior Court had no jurisdiction she contended that this issue not having been raised in the superior court, we do not have the benefit of the decision of the superior court. Indeed, she argued that the respondents were content not to take the point. This is true but it does not deprive this Court of the power to entertain such a point for the first time. It has been held in the case of Kenindia Assurance Company Ltd. vs. Otiende (1989) 2 KAR 162 that the normal rule that a party cannot raise for the first time on appeal a point he had failed to raise in the High Court, does not, apply when the issue sought to be raised for the first time on appeal goes to jurisdiction. The Court in the Kenindia case (supra) stated at page 164:-

"But neither that admission nor the invitation can confer on the court jurisdiction when none exists."

Apart from the proceedings having been riddled with jurisdictional irregularities from the start, there were a series of steps of procedural nature which resulted in unusual orders in an Originating Summons. We do not trouble ourselves (nor is it necessary for the decision of this appeal) to set these out at length or to consider them. We cannot, however, refrain from observing that the orders of the learned Judge appealed against were made on a date to which the case had been stood over for a mention only. Notwithstanding this the learned Judge on the mention date proceeded to hear and allow an oral application for a substantial amendment to the Originating Summons (including the prayer for damages), an oral application for directions as to the future course of hearing and an indefinite extension of an ex-parte injunction he had granted earlier. This Court has already had occasion in the case of Mrs Rahab Wanjiru Evans vs. Esso Kenya Ltd (Civil Appeal No.13 of 1995) (unreported) to deal with a similar situation. It was stated:-

"We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no business determining on that date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice".

We are simply amazed at the orders that were made in the first instance. Upon a careful and anxious consideration however, we are clearly of the view that the complaints made on behalf of the appellant are well founded and must be upheld.

In the result, we have come to the conclusion that the only course open to us is to allow the appeal and set aside the ruling and order of the superior Court dated July 7, 1995.

The amended Originating Summons is struck out with costs and all the orders made by the superior court therein are set aside. The first respondent shall pay to the appellant its costs of this appeal.

Dated and delivered at Nairobi this 11th day of December, 1995.

J. E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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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.