Mwathi v Kenya Commercial Finance Co (Civil Application 12 of 1987) [1987] KECA 59 (KLR) (10 July 1987) (Judgment)

Mwathi v Kenya Commercial Finance Co [1987] eKLR

Neutral citation: [1987] KECA 59 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 12 OF 1987

EN JUMA, HG PLATT & JM GACHUHI, JJA

JULY 10, 1987

BETWEEN

MWATHI ..... APPLICANT

AND

KENYA COMMERCIAL FINANCE CO ..... RESPONDENT

Conditions for the sale of the property, in a sale by public auction, had to be met at the fall of the hammer so as to form a binding contract

The instant case involved the sale of charged property through a sale by public auction. The auction purchaser had paid 25% of the purchase price two days after the sale through arrangements entered into after the fall of the hammer. The court held that it was a fraud to the mortgager and other intending purchasers to conclude a contract without the payment being made as required at the fall of the hammer.

Reported by Kakai Toili

Land Law *- mortgages and charges – statutory power of sale – sale of secured land by public auction – purchaser paying 25% of the purchase price two days after fall of the hammer – whether the contract of sale was completed – whether right of redemption was still available to chargor – whether failure by a purchaser, in a sale by public auction, to pay 25 percent of the purchase price at the fall of the hammer rendered the contract non-binding contract.*

Land Law *– sale by public auction – exercise of chargee's statutory power of sale – when was the contract of sale completed – where the purchaser paid 25% of the purchase price two days after fall of the hammer – whether the contract of sale was completed.*

Civil Practice and Procedure *- injunction – principles applied by the court in granting injunctions – consideration of matters that could not be compensated in money.*

Brief facts

The applicant was advanced a loan by the respondent for which a piece of land was provided as security along with the applicant's father's guarantee. After the applicant failed to make repayments of the loan, the

respondent issued a notice of sale of the security land. The respondent was however persuaded to grant the applicant a month to sell the security.

In due course, however, the applicant received a notice of sale by public auction of the land. On the day of the sale, she obtained an *ex parte* interim injunction to stop the sale. The restraining order was served after the sale but before the registration of the sale to the auction purchaser. The auction purchaser paid 25% of the purchase price two days after the sale through arrangements entered into after the fall of the hammer. After an *inter partes* hearing, the injunction application was refused and the applicant moved to the Court of Appeal.

Issues

i. Whether failure by a purchaser, in a sale by public auction, to pay 25 percent of the purchase price at the fall of the hammer rendered the contract non-binding contract.

ii. Whether a one month notice by a chargee to a chargor to sell charged property was unreasonable.

Held

1. The transaction of sub-division and sale of a piece of land could not be accomplished within a matter of 30 days. It had to be appreciated that a surveyor had to be found, had to go to the land, had to draw plans, and submit them for approval by the department of survey, had to place beacons, then advertise for sale and thereafter get the buyer to deposit money with his lawyer pending the discharge of the charge and the registration of the transfer before the money could be paid. The respondent was aware of all those steps.
2. While acting under the powers contained in the charge, the parties ought to act reasonably. The notice contained in the letter of June 20, 1986 was entirely unreasonable and inappropriate under the circumstances. The applicant ought to have been given reasonable time within which to carry out the sub-division and sale of 2.5 acres which the respondent had committed the applicant to do.
3. The applicant was applying for an injunction to redeem the charges as the obstacle that had impeached the sub-division and sale had been overcome. Powers to redeem were always available so long as a binding contract had not been made. The respondent was aware of the pending application in the High Court. It was adjourned for the purpose of settlement but no settlement was reached. It was dismissed in the High Court and then the applicant immediately filed the instant application to the court.
4. Although courts invariably refused to grant an injunction where damages would be adequate, it was not always the case. In some cases, there were sentiments which could not be compensated in money.
5. The auctioneer was also aware of the pending application. It was possible for him to say that he was served with a court order stopping the sale. That could be so, but was the sale in terms of the condition of sale. All conditions for the sale of the property provided that a certain percentage had to be payable at the fall of the hammer so as to form a binding contract. It was after the payment that the contract of sale document was signed.
6. It was a fraud to the mortgager and other intending purchasers to conclude a contract without the payment made as required at the fall of the hammer. If other intending purchasers would know that they would be granted more time to pay deposit, they would have given their bids and perhaps for more amounts. Since the deposit of 25% was paid two days after the sale and after the court order had been served on the auctioneers, there was no binding contract.
7. Having considered all those matters, the court would grant the injunction as prayed with no order as to costs. While the matter was being heard by the court, the applicant was at liberty to redeem the charge.

Dissenting opinion

Per Platt JA

1. What section 77(2) of the Registered Land Act provided was that when the chargor was in possession of charged land, the chargee would become entitled to recover possession of land "upon a bid being accepted at the auction sale." Nevertheless the interest of the chargor would pass only on registration of the transfer as provided in section 77(4) of the Act. That was why the *interpartes* hearing was profitable.

2. The amendment of section 60 of the Transfer of Property Act could have no effect on the provisions of the Registered Land Act because section 72 of the latter Act provided for the right of redemption in different terms to section 60. There was no provision by which the right of redemption would be exercised in section 72, as there was in section 60 as amended.
3. There was the question whether the procedure of the sale itself was defective, because the 25% deposit was not paid at once. On that point there was no provision in the Registered Land Act relating to the steps in the sale. According to the purchaser's letters attached to Mr Migwalla's affidavit dated March 30, 1987, the bank intervened to say that further information would be forthcoming about payment.
4. The sale should probably have stopped there because of the order of the court. But payment went ahead and full payment had been made. It made no difference whether the sale process was interrupted by the court at the stage of payment or at the stage of transfer. So long as transfer had not been affected the sale was interrupted and could not be fulfilled.
5. The chargee had given notice; the chargor had not redeemed; and the main point was that the chargor had still not redeemed. The only action that would save the chargor was payment in redemption. In principle, the chargee appeared to have had the right to sell the property.
6. It would not be right for the court on appeal to interfere with the exercise of the trial court's discretion, unless it was wrong in law or in all the circumstances it reached a perverse conclusion. The appellant was really seeking time. She has had over one year to redeem. Let her redeem now before the transfer. Let her recall that the terms of her father's charge was that the bank had the right to refuse her father to sell the property. In so far as the applicant had an interest, she had to redeem like her father.
7. On the principles that apply in the instant court under rule 5(2) (b) of the Court of Appeal Rules, the *status quo* to be preserved pending appeal, was the bank's statutory right of sale with the right of redemption given to the applicant's father. If he could not redeem then the right of sale could be exercised, and certainly the applicant had ample time in which to redeem, herself or to help her father, to redeem. What the applicant should do was to lodge the money in court. The affidavit evidence before the court satisfied the court that the rights of the applicant, who was exercising her undoubted right of appeal, should be protected until the court has heard the matter and determined it. There was not, at the instant stage, any circumstances which suggested that the intended appeal would be frivolous or that a stay of execution would cause more hardship than otherwise.

Application allowed; no order as to costs; costs of the application to be costs in the appeal.

Citations

Bananahill Investments Ltd v Pan African Bank Ltd & others Civil

Application No NAI 69 of 1986 (unreported)

Statutes

1. Court of Appeal Rules (cap 9 Sub Leg) rule 5(2)(b)
2. Transfer of Property Act, 1882 section 60
3. Registered Land Act (cap 300) sections 72,73,74,77,77(2),77(4)

JUDGMENT

1. This is an application under rule 5(2)(b) of the Court of Appeal Rules seeking a stay of execution pending the hearing of an appeal to this court. The appeal is against the refusal by the High Court to grant an injunction to stop a sale of property by public auction. An interim injunction was granted on February 3, 1987 to remain in force until the hearing of the motion interpartes. The hearing was concluded on March 31, 1987. The applicant is the principal debtor who was advanced a loan of Kshs

150,000 by the respondent. The loan was guaranteed by her father who also charged as security his property situate at Eldoret and known as Eldoret Municipality/Block 13/26.

2. Disputes arose between the applicant and her father, the guarantor because the applicant claimed entitlement to a share in the property. As a result of the dispute, repayments were not maintained. Their dispute was finalized in a suit in the High Court Nairobi being civil suit No 4571 of 1986 to which the respondent was not a party. The High Court suit ended in a consent order being recorded to the effect that the father will transfer 2.5 acres of the subject matter to the applicant.

3. The applicant was served with a notice of sale of this property to be conducted by a court broker at Eldoret. She filed a suit in the High Court seeking an injunction to stop the sale. That application was dismissed, hence the filing of this application.

4. The time left over after the receipt of the notice of sale was very short. The property was sold by public auction on the day the interim injunction was granted. It was served on the auctioneer the following morning.

5. In the course of the hearing of this application, the respondent filed an affidavit setting out steps taken since the granting of the loan. The applicant produced a copy of a letter dated June 20, 1986 from Messrs Hamilton, Harrison and Mathews advocates for the respondent to the advocate for the applicant Messrs Tanui and Company of Eldoret. This letter was not included in the respondent's bundle of correspondence. The contents of it read:-

> " With reference to our letter dated June 12, 1986 we wish to advice that after giving the matter due consideration our client have agreed to allow a further extension of time up to July 20, 1986 when all subdivision conveyancing and sale formalities will have been completed and redemption amount plus interest and costs paid to us.

6. We would be obliged if you would let us know the present position. Note that no further extension of time will be allowed."

7. The applicant complained that after the receipt of this letter, steps were taken to sub-divide the land in order to sell portion of it to repay the loan. Consent of the Commissioner of Lands was obtained and Kshs 24,000 paid to Kenya Commercial Bank Finance Co Ltd in October 1986. Further amount of Kshs 7,000 was paid to the bank. Inspite of this arrangement being allowed time to be completed, the respondent proceeded and sold the property at a price below the market value. The applicant's wish has always been to redeem the property. It also transpired that though the sale was on February 3, 1987, the 25% purchase price was not paid at the fall of the hammer as provided by the conditions of sale. The amount was paid on February 5, 1987 well after the order of the court had been served on the auctioneers.

8. Mr Nyamu for the respondent agrees that the sale was conducted as stated above and that 25% was paid on February 5, 1987 through arrangements entered into after the fall of the hammer. He argues that the property having been knocked down they were entitled to negotiate for the payment. He submitted that arrangements have been made to transfer the property as they entered into a binding contract. He referred to the amendment to section 60 of the Transfer of Property Act.

9. The issue now is whether the respondent having extended time and allowed the applicant to sub-divide the land for sale and part of the money paid after this arrangement, can the respondent back-up from the arrangement unilaterally and sell the property without further notice?

10. The transaction of sub-division and sale of a piece of land cannot be accomplished within a matter of 30 days. It must be appreciated that a surveyor has to be found, had to go to the land, had to draw plans,

and submit them for approval by the department of survey, had to place beacons, then advertise for sale and thereafter get the buyer to deposit money with his lawyer pending the discharge of the charge and the registration of the transfer before the money could be paid over. The respondent is aware of all these steps. While acting under the powers contained in the charge, the parties ought to act reasonably. The notice contained in the letter of June 20,1986 is entirely unreasonable and inappropriate under the circumstances. At least I feel that the applicant ought to have been given reasonable time within which to carry out the sub-division and sale of 2.5 acres which the respondent had committed the applicant to do. The applicant is applying for injunction to redeem the charges as the obstacle that had impeached the sub-division and sale has been overcome. Powers to redeem is always available so long as a binding contract has not been made. The respondent was aware of the pending application in the High Court. It was adjourned for the purpose of settlement but no settlement was reached. It was dismissed in the High Court and then the applicant immediately filed this application to this court. Although courts invariably refused to grant injunction where damages would be adequate, it is not always the case. In some cases, there are sentiments which cannot be compensated in money – BurnhillInvestments Ltd v Pan African Bank Ltd and Others, Civil Application NAI 69 of 86 (unreported) at page 6.

11. The auctioneer was also aware of the pending application. It is possible for him to say that he was/ served with a court order stopping the sale. That may be so, but was the sale in terms of the condition of sale! All conditions for the sale of the property provide that a certain percentage must be payable at the fall of the hammer so as to form a binding contract. It is after the payment that the contract of sale document is signed. It is a fraud to the mortgager and other intending purchasers to conclude a contract without the payment made as required at the fall of the hammer. If other intending purchasers would know that they would be granted more time to pay deposit, they would have given their bids and perhaps for more amount. I feel that since deposit of 25% was paid two days after the sale and after the court order had been served on the auctioneers, there was no binding contract.

12. Having considered all these matters, I would grant the injunction as prayed with no order as to costs. While the matter is being heard by the court, the applicant is at liberty to redeem the charge.

13. Platt JA (Dissenting). This is an application asking for an injunction to be issued to restrain the Kenya Commercial Finance Co Ltd from exercising its powers of sale as a chargee under the Registered Land Act (cap 300). The sale took place on February 3, 1987. This court issued an interim injunction on that day which was served the following day but the registration of the sale to the auction-purchaser has not been accomplished. It is possible therefore for the court to prevent the fulfillment of the sale even now.

14. The sequence of events is instructive. The applicant borrowed Kshs 150,000 from the respondent bank in 1984. A letter of commitment incorporating the terms of the loan was signed on April 25, 1984. The purpose of the loan was for the applicant to purchase a posho mill to be installed in Nyahururu. The applicant's father supported her. He allowed his property, the subject of the injunction and sale, to be charged as security in favour of the respondent bank, on April 25, 1984. This charge was registered on August 17, 1984. The applicant's father gave his own guarantee on November 30, 1984 and to continue quarterly. Payment was not made. On December 18, 1984 notice was sent to the applicant, as required by the Registered Land Act (section 74). On January 31, 1985 notice was sent to the applicant's father, the guarantor. The next payments were due on February 28, and May 30, 1985. A final notice was sent by the bank on June 17, 1985. It was noted that no further reminders would be sent to the applicant. In April, 1985 however, Mr Tahir Malik wrote to the bank, saying that the

reason for the applicant's inability to pay (ie in November 1984 and February, 1985) had already been explained. The default seems to have been caused by the late delivery of the machine. He continued-

> "Now that my client's poshomill is operational she requests that the payment be rescheduled."

15. It was suggested that payments start on June 30, 1985. But this plan seems to have fallen through because on August 14, 1985 a new set of payments of the debt was put forward. It was to be Kshs 10,000 on September 5, 1984, November 5, 1985, February 5, 1986 and then on May 5, 1986 Kshs 27,000 would be paid. But these payments did not materialize. On October 29, 1986 the applicant offered Kshs 20,000 by the end of December, 1986. The reason given for the delay was the illness of the applicant's husband. The bank proposed to sell the property of the guarantor, on December 16, 1985. Mr Timan Njugi of Counsel asked for a further 60 days. The property was to be subdivided and planning approval had been given. The surveyor had made the road of access too narrow, otherwise subdivision would have been completed. A loan of Kshs 50,000 was to be raised with a co-operative society. That pleading was successful and the sale was put off. But apparently nothing came of the arrangements and notice was given to the guarantor on February 21, 1986. The property was put up for sale on May 20, 1986. On May 15, 1986 Tanui & Co pleaded for the applicant. It was now said that:

> " The registered proprieter had sub-divided the property and (intended) to sell two portions."

The purchase price was to be forwarded as soon as it was received.

16. The applicant herself wrote on May 16, 1986 that she had forwarded one sum of Kshs 7,000 not taken into account. It was due to a bereavement that she had not paid. Another 30 days could see the payment made. The bank responded and granted time. On May 23, 1986, Tanui and Company explained that the sub-division had been carried out and approved on

17. April 17, 1986. The survey work was due to be done in the following week in May. Two more months were required. The portions to be sold would fetch Kshs 280,000. Once against the sale was put off. By a letter dated June 20, 1986 a further extension of time up to July 20, 1986 was allowed "when all subdivisions conveyancing and sale formalities will have been completed and redemption amount, interest and costs paid to (the bank)." But no further extension would be granted.

18. At sometime in 1986 High Court Civil Case no 4571 of 1986 between the applicant and her father ended in a consent order that the father would transfer 2.5 acres of his five acres to the applicant. It is not clear how this could be carried out. The charge document forbade such a transfer in paragraph 2(1) without the consent of the chargee (or "lender" as the bank is called). The bank was not a party to the suit. No consent is alleged to have been given. Whether this consent order had any effect is not clear.

19. On the other hand, the registered proprietor himself had sub-divided his property, and that the bank accepted at least in its letter of June 20, 1986, which the applicant produced in court. According to Tanui & Co the subdivision had be approved in April, 1986.

20. The two portions amounted to one acre which would produce Kshs 280,000. That would cover the loan. All that was needed was the survey work, and the transfer. This would take two months from May, 1986. When the bank gave Tanui and Co its agreement to the subdivision, it was fulfilling the requirement that it should give consent in the charge, and it was allowing the time asked for by Tanui & Co. Two months from May would be July. Moreover the applicant was completely within the hands of the bank, as the proviso to the charge explains. Consent was to be given in the discretion of the bank and upon such terms as the bank should see fit.

21. Once again the loan was not redeemed, which the bank was prepared to allow. The property was put up for sale and was sold on February 3, 1987. This was a further seven months after the close of the negotiations. The loan was not redeemed by the applicant or her father. Only some Kshs 30,000 had been paid.

22. The applicant then took High Court suit No 502 of 1987 to stop the sale. She failed to persuade the High Court to stop the sale by temporary injunction. She now appeals. She claims that the sale by auction to have been a gross undervaluation. Opinions differ as to the value but the one acre to be sold did not apparently fetch Kshs 280,000. Had it done so, the loan would have been redeemed, and whatever had been paid – not a great sum of Kshs 150,000 with interest; would have been taken into account. It is fair to conclude that with the extra seven months until February, 1987, the applicant and her father had had time to redeem the property.

23. Section 73 of the Registered Land Act was raised during argument. But that does not avail the applicant, because even if she had an interest in the land, due to the consent order in the High Court, the applicant had still to redeem and pay the loan. She did not.

24. Next, there is the question of the nature of the sale. Mr Nyamu submitted that under section 77 of cap 300 the land is deemed sold when the bid is accepted. But that is not the law. What section 77(2) provides is that when the chargor is in possession of charged land, the chargee shall become entitled to recover possession of land "upon a bid being accepted at the auction sale." Nevertheless the interest of the chargor will pass only on registration of the transfer as provided in section 77(4). That is why this interpartes hearing was profitable. On the other hand Mr Nyamu's reference to the amendment of section 60 of the Transfer of Property Act can have no effect on the provisions of the Registered Land Act because section 72 of the latter Act provides for the right of redemption in different terms to section 60. There is no provision by which the right of redemption shall be exercised in section 72, as there is in section 60 as now amended.

25. Finally there is the question whether the procedure of the sale itself was defective, because the 25% deposit was not paid at once. On this point there is no provision in the Registered Land Act relating to the steps in the sale. According to the purchaser's letters attached to Mr Migwalla's affidavit dated March 30, 1987, the bank intervened to say that further information would be forthcoming about payment. The sale should probably have stopped there because of the order of this court. But payment went ahead and full payment has now been made. In my opinion it makes no difference whether the sale process is interrupted by this court at the stage of payment or at the stage of transfer. So long as transfer has not been affected the sale is interrupted and cannot be fulfilled. The great question is whether in principle the chargee was entitled to sell the land. The chargee had given notice; the chargor had not redeemed; and the main point is that the chargor has still not redeemed even upto this present moment. The only action that will save the chargor is payment in redemption. In principle, the chargee appears to have had the right to sell the property.

26. Should the court interfere on grounds that the highest bid at the sale was at an undervaluation? This is not one of those cases where the property is clearly sold at an undervaluation. The bank's estimate was that the property was worth Kshs 500,000. The higher estimates were not proved in practice to be obtainable as already noted.

27. It will not be right for this court on appeal to interfere with the exercise of the learned judge's discretion, unless he went wrong in law or in all the circumstances he reached a perverse conclusion. There is no great attack at present on these grounds. The appellant is really seeking time. She has had over one year to redeem. Let her redeem now before the transfer. Let her recall that the terms of her father's charge

is that the bank has the right to refuse her father to sell the property. In so far as the applicant has an interest, she must redeem like her father.

28. In conclusion therefore I would refuse the applicant the injunction she seeks. She is sinking more and more heavily into debt with rising interest.

29. On the principles that apply in this court under rule 5(2) (b) of the Court of Appeal Rules, the status quo to be preserved pending appeal, is the bank's statutory right of sale with the right of redemption given to the applicant's father. If he cannot redeem then the right of sale may be exercised, and certainly the applicant has had ample time in which to redeem, herself or to help her father, to redeem. What the applicant should do is to lodge the money in court. She has not done so, therefore I would dismiss the application with costs.

30. Nyarangi JA. I agree with what has fallen from Gachuhi JA. The affidavit evidence before me satisfies me that the rights of the applicant, who is exercising her undoubted right of appeal, should be protected until this court has heard this matter and determined it. There is not, at this stage, any circumstances which suggests that the intended appeal will be frivolous or that a stay of execution will cause more hardship than otherwise.

31. In my view this is a case in which the usual practice of this court should be applied, there being no special circumstances which would persuade me to order otherwise.

32. I would accordingly grant the injunction and as Gachuhi JA is of the same opinion, it is so ordered. No order as to costs. Costs of the application to be costs in the appeal.

DATED AND DELIVERED AT NAIROBI 10TH DAY OF JULY, 1987

J.O. NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL