



Virdee v Bhatt

High Court, at Nairobi June 5, 1985

Simpson CJ

Civil Case No 2574 of 1980 (OS)

Land – contract for sale of – whether contract conferring interest in land – whether prospective purchaser a person entitled to redeem mortgage over land – Transfer of Property Act, 1882 sections 54; 83; 91(a),(b). Mortgage – redemption of – persons entitled to redeem – charge over immovable property created by deposit of documents of title— plaintiff claiming entitlement to redeem mortgage by contract of sale – whether such contract creating interest in mortgage property – whether plaintiff a person entitled to redeem - Transfer of Property Act, 1882 sections 54; 83; 91(a),(b).

The plaintiff filed an originating summons against four mortgagees under a memorandum of charge by deposit of documents of title and against the administratrix of the estate of the deceased mortgagor. The plaintiff, who purported to have deposited in court the amount remaining due on the mortgage under section 83 of the Transfer of Property Act, 1882 claimed to be a person entitled to redeem the mortgage by section 91(a) and/or (b) of the Act. The interest on which the plaintiff relied was an agreement to sell to him the property in question made between the two sons of the deceased as prospective administrators of the estate. Two years after the agreement, however, letters of administration had been issued to the deceased's widow and not to the sons.

One of the points raised in the defendant's preliminary objection was that a contract of sale could not of itself create an interest in the immovable property.

Held:

1. Under section 54 of the Transfer of Property Act, 1882, a contract for the sale of immovable property does not of itself create an interest in that property.
2. The plaintiff was not a person entitled to redeem the mortgaged property. Suit dismissed.

Cases

No cases referred to.

Texts

Mulla's Transfer of Property 4th edition at p 516

Statutes

1. Civil Procedure Rules order 36 rules 7 and 3A
2. Transfer of Property Act section 91(a) and/or (b)

3. Probate and Administration Act section 90(3)

Advocates

Advocates

Mr Nzioka for Plaintiff

Mr R D Patel for 1st, 2nd, 3rd & 4th Defendant

Mr A B Shah for 5th Defendant

June 5, 1985, Simpson CJ delivered the following Judgment.

The plaintiff in this originating summons under order 36 rules 7 and 3A, Civil Procedure Rules claims to be entitled to redeem a mortgage under the provisions of section 91(a) and/or (b) of the Transfer of Property Act. The first four defendants are the mortgagees under a memorandum of charge by deposit of document of title dated March 1, 1961 and the 5th defendant is the administratrix of the estate of the deceased mortgagor who died sometime before October, 1969. The plaintiff has deposited in court the sum of Kshs 106,075 under the provisions of section 83 of the act. He claims to be entitled to redeem the property by virtue of being a person having an interest in the property or in the right to redeem the property (section 91 (a) and (b)). The interest on which he relies is an alleged agreement to sell to him the property in question made in 1970 between the 2 sons of the deceased in their capacities as intended administrators and himself with the knowledge and consent of the widow of the deceased.

The intended administrators never became administrators and were never in a position to give title to the land. Letters of Administration were issued to the widow some 2 years after the alleged agreement. (Mombasa P&A case No 34 of 1972).

If there was a completed agreement which is at least doubtful there is nothing in the correspondence exhibited by the plaintiff to show that the administratrix was a party to it. There is only the statement of the plaintiff in his affidavit in support of the originating summons to the effect that the agreement was made with her knowledge and consent. No replying affidavit has been filed by the defendants. Mr A B Shah for the 5th defendant raised two points of law in a preliminary objection. In this he was supported by Mr R D Patel for the other 4 defendants.

Section 90(3) of the Probate and Administration Act which is applicable provides that an administrator may not, without the previous permission of the court by which the letters of administration were granted transfer any immovable property for the time being vested in him.

Under sub-section (4) any such disposal is voidable at the instance of any other person interested in the property. Mr Shah submitted that no permission on having been obtained from the High Court in Mombasa there is no enforceable contract of sale on which the plaintiff can rely. If there was a contract sale he continued in his second point the plaintiff would not be entitled to redeem the property. Section 83 of the Transfer of Property Act gives the mortgagor or any other person entitled to institute a suit for redemption of mortgaged property power to deposit in court the amount remaining due on the mortgage. This the plaintiff purported to do but entitlement to institute such a suit is set out in section 91. The plaintiff claims to be so entitled by virtue of having an interest in the property or in the right to redeem it. The interest on which he relies is a contract of sale but section 54 of the act provides that a contract of sale does not of itself create an interest in the immovable property in question. In Mulla's Transfer of Property 4th edition at p 516 the learned authors write with respect to section 83:

“The summary procedure for redemption is available not only to the mortgagor but to any person entitled to redeem under section 91; and so a person under contract to purchase cannot make a deposit” Again, in relation to section 91, the following passage appears at page 525:

“But a contract to purchase does not create an interest in or charge on the property and a person who has merely contracted to purchase the equity of redemption has no right to redeem.”

Mr Nzioka for the plaintiff submitted that the plaintiff was a person entitled to institute a suit for the redemption of the property under section 91 of the Transfer of Property Act and to deposit the money due under section 83. The decision to have the widow appointed instead of the intended administrators he suggested was made for the purpose of escaping from the contract made by them. He mentioned that the plaintiff has now left the country and his son has been given a power of attorney.

Having regard to the provisions of section 54 of the Transfer of Property Act I am of the view that the plaintiff is not a person entitled to redeem the property. In this view I am supported by the statement I have quoted from Mulla’s Transfer of Property. This disposes of the suit which is accordingly dismissed. I order that the caveat lodged by plaintiff, Assa Singh Virdee, on April 1, 1977 forbidding the registration of any dealing with the land LR 209/2389/49 title to which is registered as IR 6044/1 be lifted.

The plaintiff will pay the costs of this suit of all 5 defendants to be taxed in default of agreement. The amount deposited in court by the plaintiff will be released to him after deducting there from the total of these costs.