



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Law, Potter JJA & Hancox Ag JA)

CIVIL APPEAL NO 60 OF 1982

BETWEEN

KENYA COMMERCIAL BANK LTD.....APPELLANT

AND

OSEBE.....RESPONDENT

JUDGMENT

Hancox Ag JA The respondent to this appeal charged his property at Kisii/Central Kitutu/ Daraja Mbili/681 to the appellant Bank, the Kenya Commercial Bank Ltd, at Kisii, to secure a loan of Kshs 30,000 on April 25, 1978. At that time, the Bank's own internal valuation of the property, including buildings and crops, was Kshs 93,000 and the buildings themselves were insured with the Phoenix East Africa Assurance Co Ltd against fire for Kshs 70,000, which agreed with the sum shown against the buildings in the Bank's valuation. Unfortunately, the respondent fell into arrears with his payments and the Bank sent two notices to him, both described as "final", on April 4 and September 14, 1979 respectively. Those notices expressed the Bank's intention to exercise its rights under the Registered Land Act (Cap 300) and arrange for the sale of the property by public auction. On the first of those dates, the sum said to be outstanding was Kshs 20,616.10, but by August 15 that year, it had been reduced to Kshs 18,490.60.

By January 29, 1980, the indebtedness had been further reduced to Kshs 13,775 and by the date of the sale, March 25, 1980, to Kshs 8,027.20, Kshs 2,700 having been paid and accepted by the Bank without prejudice to its rights, on the day of the auction. At the auction, which the learned Judge expressly found was not conducted irregularly or improperly, the property fetched only Kshs 20,000, but it seems that the Bank envisaged an even lower price, for on January 29, 1980, it wrote to the Auctioneer stating that if the price realised fell short of the sum then due (Kshs 13,775), the Bank broker would have authority to give instructions to accept that lower figure. It may be, however, that that is a standard form of instruction given to the auctioneers in these cases.

Charles Otundo, having bought the property at the auction, subsequently entered into an agreement to sell it to Joseph Christopher Njiriri on April 14, 1981, barely a year after the auction sale, for Kshs 180,000 paid, according to the receipts, as to Kshs 30,000, on April 14 and as to the balance of Kshs 150,000 on May 4. The price shown in the extract from the Title Registry was, however, only Kshs 20,000 and Mr Kwach, who appeared for the Bank on this appeal, stated that that was merely a provisional figure to enable the registration of the new owner to take place quickly, and that it is covered by an undertaking of the Advocate acting for the transferee to pay any additional stamp duty and other dues eligible on the true price, which undertaking in this case was given by Mr Ominde Achayo on April 24, 1981.

Meanwhile, the respondent had obtained his own valuation of the property from an independent firm, Messrs Horeria Mathu & Co, on September 17, 1980, stating that it was worth Kshs 160,000 and he sought to register a caution against dealings with it on the grounds that he had just filed an originating summons in the High Court for the purpose of determining the validity of the auction sale and the price of Kshs 20,000 that had been obtained for the property. Added to this, he subsequently discovered that the new owner, Njiriri, had charged the same property to the same Bank that had sold it above his head, as it were, for Kshs 200,000, this being shown in the Register as occurring on May 2, 1981, less than 6 months after the discharge of the Bank charge against him under Section 74 of the Registered Land Act (Cap 300).

It is against this background that the respondent filed an amended and very considerably expanded originating summons, supported by what is described as an Amended Affidavit, on April 29, 1982, alleging, in effect, that the Bank and the two subsequent buyers had conspired to swindle him out of the property for the paltry sum of Kshs 20,000. Fraud was alleged (though the learned Judge rejected this) and the sale by auction sought to be set aside with a request for determination, *inter alia*, of the question as to whether the respondent had suffered damages. There was an express claim for damages in the amended summons. Basing his submissions almost entirely on the disparity in the respective figures in relation to the property that I have endeavoured to set out, Mr Soire submitted to the learned judge on the hearing of the summons, as he has to this court, that the sale by auction was not only harsh and unconscionable, but, as I have said, fraudulent, in bad faith and without any regard for the interests of the chargor as required by subsection (1) of Section 77 of the Act. Accordingly, he asked that his client be allowed to repay the Kshs 20,000 and that the sale of March 25, 1980 should, in equity, be set aside. Specifically he said that a reserve price should have been fixed, as Section 77 (1) envisages.

Notwithstanding his earlier findings that there had been no fraud, and that there was no impropriety in relation to the auction itself, the learned Judge held that the interests of the respondent as chargor had not been taken into consideration, that the Bank had been “careless, negligent and reckless” and, taking the middle figure between the plaintiff’s valuation and the latest loan by the Bank, purported to award him Kshs 180,000 by way of damages. I say “purported” because the principal complaint on behalf of the Bank in this appeal is first, that there was no power on an originating summons to award damages and, secondly, that the learned judge embarked upon a journey of his own in making the award.

Before the appeal was heard, this Court allowed again what purported to be an application for leave to lodge the appeal out of time, which was made with an abundance of caution, because, although the Notice of Appeal was filed in time, and was so stamped in the Registry, it was subsequently returned to the Bank’s advocates because the required fee of Kshs 150 had not been paid, due to an oversight. We did not read either of the sub-rules of rule 103 of the Court of Appeal Rules, or the authority cited to us, as requiring the simultaneous payment of the fees unless the Registrar of either Court so ordered. We accordingly allowed the application.

On the substantive appeal, Mr Kwach developed his submissions as to the power of a Court on an originating summons. He said, and I do not think it is denied, that all the letters, advertisements and steps prior to the sale had been written, published and carried out and the sale itself conducted regularly. It was not mandatory under Section 77(1) to set a reserve price and the Bank only recovered that which it was entitled to. He compressed his Grounds of Appeal into two main heads, namely:

- “1) That there was no power to award damages on an originating summons; and
- 2) That there was no justification for the judge’s findings that the Bank had failed to have regard to the interest of the chargor, and that it was “careless, negligent and reckless”.

Rule 3A of Order XXXVI of the Civil Procedure Rules provides:

“Any mortgagee or mortgagor, whether legal or equitable ... may take out as of course an originating summons ... for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the

mortgagee.”

Neither in that rule, nor in any of the other Rules in that Order was there a power to award damages and the Judge should, accordingly, have acted under rule 10 and declined to deal with the matter upon an originating summons. I may say that none of the three counsel who appeared before him (Mr Onyanha then represented Charles Otundo) took this point and for my part, I would have thought it was their duty to have done so; particularly as it was, as Mr Kwach put it, the Judge’s maiden civil case.

In support of the first limb of his submissions, Mr Kwach cited Sir Ralph Windham CJ’s judgment in *Ramji Kulsumbhai v Ramji’s Executors and Others* [1957] EA at p 701 where he said:

“It was pointed out in *Re Giles (2)* [1980] 43, Ch D 391, that such procedure was intended, so far as we can judge, to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.”

And I would also refer to the following passage from a judgment of my own in *Salehmohamed Mohamed v PH Saldanha* (3), Kenya Supreme Court (Mombasa) Civil Case No 243 of 1953, (unreported), where the scope and general purpose of procedure by way of originating summons were being considered:

“Such procedure is primarily designed for the summary and ‘*Ad hoc*’ determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees, administrators, or (as here) the Courts’ own execution officers. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into a court.”

Even clearer is the statement he quoted from Newbold JA’s judgment in *Bhari v Khan* [1965] EA at p 101.

Moreover, strange results would follow if a judge were free to determine issues not properly before him, see Newbold JA (as he then was) in *Bhari v Khan* at page 105 letters B to C and Duffus JA at page 108 letter D. Moreover, the originating summons procedure is not for the purpose of obtaining decisions on disputed questions of fact - see *Re Sutcliffe* [1942] 1 Ch at 455 per Bennett J followed by Madan J in *Official Receiver v Sukhdev* [1970] EA at p 248. In my view, the question of whether the sale was at an under-value and whether it was mismanaged, are matters of fact which, if disputed, as they are in this case, should not be resolved on affidavit evidence - see *Standard Chartered Bank Ltd v Walker*, LS Gazette September 15, 1982 p 137, in which it was held that summary judgment should not have been given where the defendants made these allegations in their Affidavit and that they raised triable issues of fact.

As to his second limb, Mr Kwach submitted that the Bank had no duty to wait, for example, for a rising market and that it was sufficient if they merely covered what was due to them, see Halsbury’s Laws 3rd Edn Vol 27 Para 567 in support of this proposition. Finally he cited *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633, where a forced sale of a site intended for development raised 44,000 pounds instead of a probable 65,000 pounds and the circulated particulars of sale had omitted to state that planning permission had been obtained for flats, as opposed to houses. It was held that a mortgagee was not a trustee of the power of sale for a mortgagor, but he was under a duty to act honestly and without reckless disregard for the mortgagor’s interests. At p 646 letter C, Salmon LJ said:

“I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.”

It is noteworthy that the case mentioned *Kennedy v de Trafford* [1896] 1 Ch 762 in which the question

arose as to whether the sale was at such an undervalue as to be of itself evidence of fraud. That is really the way in which this case was presented to the learned Judge at first instance, and by Mr Soire to this Court, emphasizing, as he did, the steady reduction of his indebtedness by the respondent.

In reply to the first main of Mr Kwach's submission, Mr Soire said that it was not permissible for the appellant to take this point for the first time on an appeal, neither of the opposing advocates having done so at the trial - see Forbes VP in *Saggaf v Algeredi* [1961] EA at p 777,

“But these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.

In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it.”

Vidyarthi v Ram Rakha [1951] EA 527 was rather more relevant to the disallowance of a matter not raised in the pleadings than to a matter raised for the first time on appeal, but, as Mr Soire correctly observed, neither *Kulsumbhai's* case, nor in *Re Sutcliffe* nor *Sukhdev's* case (supra), were decisions on appeal, but at first instance. *Industrial and Commercial Development Corporation v Kariuki & Gatheca* [1977] KLR 52 might appear directly to support him, for at p 56 Mustafa JA said:

“Mr Muite also complained that the matter was too complicated to have been dealt with by way of originating summons. That may be so, but nobody objected to it and I can see no reason for the matter to be sent back to the High Court for hearing as a suit on that ground.”

Moreover, in *Bhari's* case (supra), the point as to the appropriateness of an originating summons was taken at first instance and expressly overruled by the learned Judge. The Court of Appeal held that he was wrong in so doing. In *Tanganyika Farmers Assn v Unyamwezi Development Corpn* [1960] EA at p 626, Gould VP said quite clearly that a new point would only be permitted to be taken on appeal when full justice can be done to the parties.

Mr Soire also referred to the *Cuckmere Brick Co* case (supra) at p 644 in support of the judge's findings that the Bank was in breach of its duty to the respondent, saying that the evidence clearly justified a finding that the property was sold well below its true market value. His remaining authority, *BAT (K) Ltd v Express Transport Ltd* [1968] EA 171 was put forward as an indication of the way in which damages were to be measured. That was a case of loss of goods by a carrier.

Thus, Mr Soire, displaying considerable skill, attempted to turn several of Mr Kwach's authorities to his advantage by pointing out that in nearly all of them, the issue as to the correctness of an originating summons was duly raised at first instance. The difficulty I have felt in acceding to Mr Soire's submissions is that in none of the cases in question did the point taken for the first time on appeal go to jurisdiction. In the recent case of *Balchin v Buckle* (Times) June 1, 1982 (a case relating to the (hitherto overlooked) non-registration of a covenant), it was held that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial Judge. Stephenson LJ said:

“It (has) been clear for nearly a century, and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been the subject of argument and decision in the County Court.

There were two exceptions to the ban on considering a point not considered in the County Court. If the County Court had done something which was illegal or outside its jurisdiction, in either case whether or not the appellant took the point the Court of Appeal could and must reverse the decision of the County Court: *Oscroft v Benabo* [1967] 1 WLR 1087.”

The right of appeal conferred by Section 72 of the Civil Procedure Act (Cap 21) is of course, statutory and confined to the grounds stated in subparagraphs (a), (b) and (c) thereof. Quite obviously the same principles apply as to an appeal from a County Court, namely that this Court can and must consider a point going to jurisdiction even though it was not raised before the judge.

I turn again to the case cited by Mr Soire on this question. In *the Tanganyika Farmers Association* case (supra), the novel point was clearly one of fact, (as to whether the contract was made with the Brokers on behalf of a different principal than the one canvassed at the trial) and in *Industrial & Commercial Development Corporation v Kariuki & Gathecha* (supra), the “complaint” of counsel for the appellant was that the matter was “too complicated” to be dealt with by originating summons: not that the Judge had no power to make the order he did. In *Saggaf v Algeredi*, the matter raised for the first time on appeal was an indulgence granted by the creditor to the principal debtor, entitling the surety to be discharged under Section 139 of the Indian Contract Act, 1872 raising as Forbes V-B said (at p 776) two questions of fact under that section and had nothing to do with jurisdiction.

With considerable reluctance, I have reached the conclusion that neither rule 3A of Order XXXVI, nor any of the other rules of that Order intended for determination of particular questions on undisputed, or to a large extent undisputed, facts, and that the point taken here on behalf of the appellant must succeed. Moreover, though sub-section (3) of Section 77 refers to the chargor’s remedy in damages, it does not provide for the method by which those damages are to be claimed, which, as in the *Cuckmere* case, is not by originating summons but by suit.

My reluctance stems from the consideration that the Judge obviously felt disturbed, as I do, at the incontrovertible facts that the respondent’s property, despite his strenuous efforts to repay, was sold by auction for about a tenth of the sum which the same Bank, barely a year later, saw fit to lend on the security of the same property to a subsequent owner. To say that all the Bank was required to do was virtually to cover its own outstanding debt is an attitude which I find not only unrealistic, but also harsh, oppressive and uncompromising in the circumstances of the case. Had it not been for the point of jurisdiction to award damages, the Judge in my view delivered a very good judgment, fully sensitive to the rights of the parties and to the issues before him; and, as I have said, his mind was never directed to this question, as it should have been. The Bank’s conduct has to my mind been shown in a most unmeritorious light, and the Judge’s finding that it did not have sufficient regard to the chargor’s interests on the sale is certainly arguable.

Nevertheless, believing as I do that there was no power to award damages on this originating summons, I would allow the Bank’s appeal on that ground, with the result that the other questions raised, such as the measure of damages, do not now fall to be decided. I would allow this appeal, to the extent of setting aside the award of Kshs 180,000 damages and leave the respondent to pursue his remedy in this respect by suit, if so advised. As no objection was raised at the hearing to the jurisdiction of the High Court to award damages on an originating summons, as claimed in paragraph (g) of the amended originating summons, and as the appeal has succeeded on a point not taken below, I would make no order for costs on this appeal. I would also order that the parties bear their own costs of the proceedings in the High Court.

Law JA. The facts and background relating to this appeal are fully set out in the judgment prepared by Hancox Ag JA which I have had the advantage of reading in draft.

The hearing of this appeal was prefaced by an application made by Mr Kwach, for the appellant Bank, for an extension of time in which to file the notice of appeal. A notice of appeal was in fact filed in time in the Sub-Registry of the High Court at Kisii on August 19, 1982. It was accepted and stamped and a copy duly served in time on the respondent’s advocate Mr Soire. For some unexplained reason, the filing fee of Kshs 150 was not paid at the time. On August 28, 1982, the Deputy Registrar at Kisii wrote to the appellant’s advocates in Nairobi returning the notice of appeal “as you did not enclose the court fees of Kisii”, together with their cheque for Kshs 150, which was accepted. In these circumstances, we considered that the original timeous filing of the notice of appeal had been validated. By rule 103(1) of the Rules of this Court, the fee payable on lodging any document is payable, that is to say due, when the

document is lodged. The Sub-Registry in this case accepted the document without a contemporaneous payment of the prescribed fee, which was paid within a few days of demand being made. The non-payment of the fee at the time was due to an oversight on the part of the advocates' local agent, but the subsequent acceptance of the fee by the Sub-Registry in our view had the effect of curing the original failure to pay. The application for an extension of time was a precaution which may not have been strictly necessary as the notice of appeal was in fact filed, and a copy served, in time.

However, no application would have been made if the fee had not been paid when the notice of appeal was lodged. In these circumstances, although we granted the application, we ordered that the respondent should have the costs thereof in any event, and we now confirm this order. As regards the appeal itself, I respectfully agree with the conclusions reached by Hancox Ag JA. The learned judge in the High Court (Aganyanya Ag J) awarded the respondent substantial damages on the basis that the Bank had been "careless, negligent and reckless". I know of no authority for the award of unliquidated damages in tort, or for breach of duty, in proceedings initiated by way of originating summons and Mr Soire for the respondent was unable to cite any such authority. This was, I think, appreciated by Scriven J before whom the matters came for hearing on December 8, 1981. That learned judge ordered as follows, under rule 10 of Order XXXVI:

"After considering the affidavits in chambers I have come to the conclusion that this originating summons cannot be tried on affidavits. The evidence of the values is vital and must be by way of oral testimony."

Scriven J adjourned the summons for hearing in open court. Aganyanya Ag J does not seem to have been aware of this order when the matter came before him on July 6, 1982, nor does his attention appear from the record to have been drawn to Scriven J's order, as he proceeded to adjudicate on the summons on the affidavit evidence and after hearing argument. Mr Balongo, who then appeared for the bank, did not object to the claim for unliquidated damages made in paragraph (g) of the amended originating summons. Had he done so, Aganyanya, Ag J would probably have appreciated that nothing in Order XXXVI confers jurisdiction on a court to award general damages in tort. In purporting so to do, the learned judge acted in excess of his jurisdiction. He should have left the respondent to pursue his claim for damages by way of a suit. For this reason, I agree with Hancox Ag JA that this appeal must succeed, to the extent indicated by him, and I concur in the orders proposed by him. As Potter JA also agrees, it is so ordered.

Potter JA. I also agree that this appeal should be allowed to the extent proposed by Hancox Ag JA and I also concur in the orders proposed by him.

Dated and delivered at Kisumu this 29th day of December, 1982.

E.J.E LAW

.....

JUDGE OF APPEAL

K.D POTTER

.....

JUDGE OF APPEAL

A.R.W HANCOX

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR