



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Law V-P, Mustafa & Musoke JJ A)

CIVIL APPEAL NO. 45 OF 1976

BETWEEN

**INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION.....APPELLANT**

AND

KARIUKI & GATHECA RESOURCES LTD.....RESPONDENT

(Appeal from the Judgment of the High Court (Chanan Singh J) Dated 25th June 1975 in

Civil Case No 414 of 1974 (OS)

JUDGMENT

Mustafa JA The respondent had charged a piece of land to the appellant under a mortgage, registered at the Government Registry in Kenya, with the repayment of Shs 500,000 advanced to the respondent by the appellant and interest. The appellant purported to exercise its power of sale under the mortgage in terms of section 69(1) of the Transfer of Property Act. The respondent applied by originating summons under the Civil Procedure Rules, order 36, rule 3(a) to stop the sale of the property and on 11th April 1974 (the date set for a sale) Chanan Singh J granted an injunction prohibiting the sale. The formal order, however, for some reason, was not issued until 30th October 1974. The appellant filed an application to discharge the injunction on the ground that it had previously, under its power of sale, sold the property on 9th July 1974. Both the applications were heard together by Chanan Singh J who, on 25th June 1975, made an order dismissing the appellant's application for discharge of injunction. He also held that the appellant had not yet exercised the power of sale within the meaning of section 69(1) of the Transfer of Property Act and that the respondent had not lost its right to redeem. He also made a declaration that the full sum, including interest due, was tendered by the respondent and received by the appellant's advocates; this constituted payment in full; and he ordered the appellant to deliver up all necessary documents of title and to execute a discharge or reconvey the mortgaged property freed from that decision that the appellant appeals.

At the trial it was assumed that the mortgage debt had become due and that the appellant had become entitled to exercise its power of sale under section 69(1) of the Transfer of Property Act.

The judge held that a mere contract of sale between the appellant and its purchaser did not extinguish the right of redemption of the respondent; in this respect he distinguished between the position in English law where an unconditional contract of sale by a mortgagee would immediately bar the equity of redemption unless done in bad faith, and the position in Kenya where the right of redemption continues until the

conveyance is registered and the sale completed. It is against this proposition that Mr Muite for the appellant directed his main submissions. In England the law is that once a mortgagee has entered into an unconditional contract of sale of the mortgaged property under section 101(1) of the Law of Property Act 1925 (similar to the provisions of section 69(1) of the Transfer of Property Act) the mortgagor's right of redemption is immediately barred so long as the contract subsists. *Lord Waring v London & Manchester Assurance Co Ltd* [1935] Ch 310, followed in *Property & Bloodstock Ltd v Emerton* [1969] Ch 94. The judge held that in Kenya the law is the same as in India, where the position is that until the sale is completed and registered the mortgagor's right to redeem remains. The judge relied on *Abraham Ezra Isaac Mansoor v Abdul Latif Usman* AIR [1944] Bom 156 and *Abraham Ezra Issac Mansoor v Abdul Mohamed Alibhai* AIR [1949] Bom 154, and the commentaries supporting that proposition in *Mulla's Transfer of Property* (5th Edn) pages 430, 501.

The Indian Transfer of Properties Act 1882 was applied to Kenya in 1897 by Order in Council; the consolidating Law of Property Act 1925 was enacted in England in 1925; section 69 was incorporated in the Indian Act in India in 1928 and in Kenya in 1939.

In England a contract of sale immediately invests the purchaser with an equitable interest in the immovable property and the beneficial ownership passes to him, only the legal estate remains with the vendor which passes on the execution of the conveyance. The Transfer of Property Act contains sections 54 and 60, and there are no equivalent provisions in the English Law of Property Act 1925. Section 54 provides, *inter alia*: (1) that a sale is a transfer of ownership in exchange for a price paid, and in the case of immovable property of the value of Rs 100 upwards (say Shs 100) can only be made by a registered instrument; and (2) a contract of sale of immovable property does not by itself create any interest in or charge on such property. Section 60 provides that the equity of redemption of a mortgagor continues until it has been extinguished by "act of the parties or by order of a court".

In the case before us the value of the property was above Shs 100 and no registration of any instrument was made and the contract of sale could not have affected the right of redemption. There was no order by a Court, and similarly no act of the parties, since only one party, the mortgagee, had acted, not the mortgagor. The contract of sale was only a personal contract between the mortgagee and the purchaser and did not create any interest in the property in the purchaser. There was no question of any conflicting equities, the mortgagor's equity of redemption as opposed to the purchaser's equitable interest in the land. In *Abraham Ezra v Abdul Latif* the Court considered the *Lord Waring v London & Manchester Assurance Co Ltd* and Crossman J's *dictum* that section 101 of the Law of Property Act 1925 gives a mortgagee a power to sell out-and-out and, once a contract of sale is completed, the mortgagor's right of redemption is extinguished. The Court referred to certain statutory provisions in the Indian Transfer of Property Act, for example sections 54 and 60, which are absent from the English Act, and came to the conclusion that in India the law is different, and that the right of redemption continues until the transfer is registered and the sale completed. Chanan Singh J followed the Indian authorities on the ground that the law in Kenya on this matter is the same as that in India.

Mr Muite has urged us to hold that the law in Kenya is the same as in England. He submitted that the wording in section 69 of the Transfer of Property Act is similar to that in section 101 of the Law of Property Act (England) and the construction placed on section 101 in England should be adopted. I do not think that section 69 of the transfer of Property Act can be construed in isolation without reference to other relevant sections. The provisions in section 101 of the English Act, section 69 in the Indian Act and in the Kenya Act all grant to a mortgagee the power of sale in the event of default, and a material point to consider is the nature and effect of a contract of sale in terms of English as opposed to Indian or Kenya law. I have already pointed out the difference. Mr Muite submitted that the difference is immaterial. I disagree. He submitted that in *Lord Waring v London & Manchester Assurance Co Ltd* Crossman J did not base his decision on the creation of an equitable interest on a contract of sale, but on the ground that to hold otherwise would produce impossible results, in that every purchaser from a mortgagee would be getting a conditional contract liable at any time to be set aside before completion of the sale by conveyance by the mortgagor making full payment. The creation of an interest or equitable estate in favour of a purchaser of immovable property on a contract of sale is such an integral part of the English law of property that it would be superfluous for an English Court to refer to it, and Crossman J's failure to

do so has no significance. Nor do I see any difficulty in the situation posed by Crossman J. In Kenya conditional contracts of sale are common. Even an ordinary purchaser of certain controlled immoveable property, as the suit land is, can have his sale declared void if he fails to obtain the necessary consent. Section 6(1) of the Land Control Act, which governs the suit land, makes a “sale” void for all purposes unless the Land Control Board has given its consent, and section 6(2) makes an agreement of sale void for all purposes if consent of the Board is not obtained within three months of the agreement; and there are certain other provisions concerning the time within which a party can appeal against the refusal of the Board to give consent. And in any event this position has obtained in India for many years and does not appear to have caused any difficulty.

Chanan Singh J followed the Indian authorities in holding that, in Kenya, a contract of sale by a mortgagee does not bar the equity of redemption. In construing the provisions in section 69 which confer on a mortgagee power of sale, one must take into consideration the provisions in section 54 which relate to the nature of a contract of sale and to section 60 which preserves a mortgagor’s right of redemption until extinguished by act of the parties or by order of a court. Similarly, section 6 of the Land Control Act would be relevant as regards the enforceability of a contract of sale before consent is obtained. Chanan Singh J considered all these provisions, and came, in my view, to the right conclusion. This finding disposes of the appeal, but I will very briefly refer to some of the side issues raised in argument by both counsel.

Mr Lakha for the respondent submitted that since judgment and decree the appellant has accepted and received full payment of the sum due and retransferred the property freed from all encumbrances. He submitted that since the appellant had obtained the full benefit of the judgment, it cannot now appeal against it while it is still in enjoyment of the benefit, as otherwise it would be approbating and reprobating the judgment at the same time. Mr Muite submitted that the appellant only complied with the terms of the decree in returning all the documents of title and executing the discharge. As regards the receipt of the sum due, he stated that it was declared in the decree that the full amount had been deposited with the appellant’s advocates and submitted that a letter dated 19th August 1975 in which the appellant asked its advocates to forward it the sum due (which incidentally was less than the amount deposited with the advocates)) “in full and final settlement” and to discharge the mortgage was irrelevant to this issue on the ground that it was written subsequent to the judgment which was delivered on 15th June 1975. In my view, the letter is relevant. Approbation of a judgment can only happen after the judgment, not before. I incline to the view that the appellant has in effect affirmed and approbated the judgment, not merely passively complied with it, and has enjoyed and continued to enjoy the full benefit of it and would be precluded from attacking it.

Another issue was whether the appellant had entered into any valid or enforceable contract with a third party (assuming that English law applies) which could have barred the respondent’s right of redemption before 1st November 1974 when it tendered full payment of the sum due. From the evidence I think that the first contract to a company in formation, Kenda Investment, was void and of no effect and the second contract to Kikko Co was probably made after 1st November 1974 when full payment had been tendered. In any event the contract of sale to Kikko would have been unenforceable for lack of consent of the Land Control Board, which is a condition precedent. And, surprisingly, no copy of any contract was produced.

Chanan Singh J was of the view that the appellant had acted in bad faith. With respect, I do not think so. The respondent was duly warned of its default on several occasions before the appellant took steps to exercise its power of sale, and I do not think that there was any element of bad faith on the part of the appellant.

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.

As regards costs, Mr Muite submitted that the appellant as mortgagee was *prima facie* entitled to costs in a mortgage redemption suit and that the trial judge did not direct his mind to this issue when he awarded costs against it in the High Court. However, I think that the appellant’s conduct in persistently denying

the respondent the right to redeem after 1st November 1974 forfeited its *prima facie* right to costs and thus placed the question of costs in the discretion of the judge. I cannot say that there was any misdirection by the judge on this matter to warrant any interference by this court. I would leave the order for costs in the High Court undisturbed. I would dismiss the appeal with costs. I would not certify for two advocates.

Law V-P delivered the following Judgment. I agree in every respect with the judgment prepared by Mustafa JA and cannot usefully add anything to it. I find myself in full agreement with the judgment delivered by Chanan Singh J in the High Court, which has been challenged in this appeal, except that like Mustafa JA I do not, with respect, agree with the judge's finding of bad faith on the part of the appellant, based on the judge's view that the appellant was anxious to sell the land at an under-valuation. The appellant had agreed to sell at a certain price on the advice of an independent and qualified professional valuer, and I do not think in the circumstances that the imputation of bad faith was justified. As Musoke

JA also agrees that this appeal fails, it is dismissed on the terms proposed by Mustafa JA.

Musoke JA. I agree with the judgment of Mustafa JA and concur in the proposed order.

Appeal dismissed with costs.

Dated and Delivered at Nairobi this 29th day of March 1977.

E.J.E.LAW

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VICE PRESIDENT

A.MUSTAFA

.....

JUDGE OF APPEAL

J.S.MUSOKE

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR