



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 14 OF 2016**

**DENNIS PATRICK KINOTI MARANGU**

**(Suing as the Legal Representative and Administrator of the Estate of**

**BENEDICT MARANGU PIUS M'ARUNGA).....APPELLANT**

**VERSUS**

**STELLA KAGWIRIA SEBASTIAN.....1<sup>ST</sup> RESPONDENT**

**SOLUTION SACCO LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction.**

1. This appeal was filed on 4/4/2016. It is an appeal against the decision of the Principal Magistrate Nkubu Law Courts in which he dismissed the appellant's application dated 23/11/2015. That application sought the orders that:

*(a) The court be pleased to allow the plaintiff to pay the loan amount due to the 2<sup>nd</sup> defendant by instalments of Kshs.200,000/= to be paid on or before 10<sup>th</sup> December, 2015 and thereafter the balance be paid in monthly instalments of Kshs.40,000/= until the full amount is paid;*

*(b) That the honourable be pleased to order the 2<sup>nd</sup> defendant to disclose to the plaintiff the correct amount of the unpaid loan with the particulars thereof to enable the plaintiff to make payments thereof;*

*(c) That the honourable court be pleased to issue an order of temporary injunction to restrain the 2<sup>nd</sup> defendant by itself auctioneers, employees, agents or anyone acting or claiming under its name from selling, attaching, taking possession of or in any way whatsoever interfering with LR. No. NKUENE/NGONYI/748 pending the hearing and determination of the prayers sought above and that the honourable court be pleased to issue further orders for the preservation and status quo of the subject property pending the hearing and determination of the suit.*

2. That application was bought under the provisions of **Sections 89, 96, 103, 104 and 106** of the **Land Act No 6 of 2012**, **Order 40 Rules 1(a), (b), 2, 3, 4, Order 51 Rule 1** and **Sections 1A, 1B, 3A, 63(c) and (e)** of the **Civil Procedure Rules**.

3. In response to the plaintiff's application the 2<sup>nd</sup> defendant filed a notice of preliminary objection dated **1<sup>st</sup> December, 2015** stating that:-

**(a) The Notice of Motion dated 23/11/2015 is *res judicata* the Notice of Motion dated 27/2/2014 which was heard and dismissed on 26/8/2015.**

**(b) That the Notice of Motion dated 23/11/2015 is an abuse of the court process and the same ought to be struck out with costs to the 2<sup>nd</sup> defendant.**

**The Grounds of Appeal**

4. The appellant's grounds of appeal against that order are that the magistrate erred in law in finding that the application before the court was not *res judicata* and yet he proceeded to dismiss the same; that by the Magistrate prematurely dismissing the appellant's application before hearing the same he condemned the appellant without hearing him, which is contrary to the rules of natural justice; that the Learned

Magistrate erred in law by failing to find that the 2<sup>nd</sup> respondent was denying the appellant rights of equity of redemption contrary to the provisions of the **Land Act No. 6 of 2012**; that the Trial Magistrate erred failing to dismiss the 2<sup>nd</sup> respondent's preliminary objection dated 1/12/2015; that the Trial Magistrate erred by failing to consider the evidence and the submissions which were tendered before the court thereby arriving at the wrong decision and that the decision of the Learned Trial Magistrate is against the weight of the evidence and the same is bad in law.

### **Determination**

#### **Issues for determination**

5. The issues raised by this appeal for determination are as follows:

*(a) Was there a breach of the rules of natural justice?*

*(b) Did the Learned Magistrate err in law by failing to find that the 2<sup>nd</sup> respondent was denying the appellant rights of equity of redemption contrary to the provisions of the Land Act No. 6 of 2012;*

*(c) The decision of the Learned Trial Magistrate is against the weight of the evidence and the same is bad in law.*

6. On the first issue listed above it is quite clear that the magistrate considered the application dated 23/11/2015 and framed the issues as he understood them to be as follows:

*(a) Whether the court could compel the 2<sup>nd</sup> defendant to accept a proposal for payment of a loan as sought in prayer 2 of the application;*

*(b) Whether it is just for the property to be preserved pending trial as was sought in prayer 5 of the application.*

7. He also came to a conclusion on those issues. In respect of the first issue he stated that the court cannot compel the 2<sup>nd</sup> defendant to accept a proposal given by the plaintiff for the first time in court.

8. On the second issue he found that though it is desirable that the suit property be preserved, the plaintiff seemed preoccupied with interlocutory applications instead of fixing the main suit for hearing. He also stated that the issues raised by the application are issues that the parties could have agreed upon if the plaintiff was serious with the reliefs he sought in the application. He found that the application lacks merit. One does not need to go great lengths to see that there was no violation of the appellant's right to natural justice. That answers the first issue.

9. The second issue raised by the appellant herein is whether the Learned Magistrate erred in law by failing to find that the 2<sup>nd</sup> respondent was denying the appellant rights of equity of redemption contrary to the provisions of the **Land Act No. 6 of 2012**.

10. I find that this issue must be addressed alongside the last issue as to whether the decision of the magistrate was against the weight of the evidence and thus bad in law as the analysis involves the same evidence and pleadings on the record.

11. **Section 89** of the **Land Act** states as follows:

*(1) Any rule of law, written or unwritten, entitling a chargee to foreclose the equity of redemption in charged land is prohibited.*

*(2) Upon commencement of this Act, a chargee shall not be entitled to enter into possession of the charged land or a charged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the charge, other than in accordance with the provisions of this Act.*

12. I have examined the contents of the plaint dated 27<sup>th</sup> February 2014 filed in the lower court. The plaintiff's case is that upon the demise of his father who owned the suit land which is family land on 11/10/2013 the 2<sup>nd</sup> defendant made arrangements to sell the suit land.

13. The plaintiff avers that because he lacked information regarding the cause of the 2<sup>nd</sup> defendant's intent to sell, sought it from the 2<sup>nd</sup> defendant at their office in Meru whereupon he found that the 1<sup>st</sup> defendant had borrowed a loan which was guaranteed by the plaintiff's father who also offered the suit land as security.

14. At that point the plaintiff sought some further information as set out in **paragraph 7** of the plaint which the 2<sup>nd</sup> defendant failed to supply him with. The plaintiff avers in his plaint that if the land is sold the family which relies on the land will be left destitute yet the family is ready and willing to settle the matter amicably by defraying any sums that may be found due. It is stated that the intended sale of the land is unlawful and premature.

15. From a human perspective, and considering the relatively brief period between the demise of the guarantor and the date of the intended sale by public auction it is doubtful whether the deceased's family had recovered from the trauma of losing the deceased by the time the 2<sup>nd</sup> defendant set in with its threats of public auction of the suit property. In my view that brief interregnum should have been sufficient to raise

questions in the trial court's mind as to whether it is indeed true as pleaded by the appellant that the intended sale of the suit land is premature and so illegal. This is much more a valid argument when considered in the light of the provisions of **Section 96** of the Land Act which provides for proper notice to the chargor alleged to be in default. It is also truer considering that administration of an estate requires gathering of information relating to the deceased, and that the principal chargor in the dispute having passed away, the administrator of his estate still seemed to be in the dark about some of the data relating to the charge and other details.

**16.** This court must assume it to be the correct position that the chargor being the registered owner of the land dealt personally with any matters related thereto. It may not be assumed that the current plaintiff who is only an administrator, though standing in the shoes of the deceased, knew of all details relating to the charge transaction.

**17.** When the plaintiff raised the issue regarding the alleged failure to provide the information as he did in the plaint and also in prayer 3 in the application before it, the trial court ought to have paused in its tracks and made an analysis of these observations outlined herein above to enable it arrive at a fair and just conclusion on the application dated **23/11/2014**.

**18.** In my view this that analysis could have been sufficient to alert the court of the need to have the facts of this case investigated further by way of hearing the evidence of the parties to the suit.

**19.** In my view though the learned magistrate needed not pronounce himself at that interlocutory stage as to whether the second defendant was attempting to deny the appellant the rights of equity of redemption contrary to the provisions of the **Land Act No. 6 of 2012** the justice of the case before him lay, if in nothing else, in directing that the status of the suit land should be preserved pending the hearing and determination of the suit. That would pave the way for the determination of the substantive rights of the parties with finality in the judgment in the case.

**20.** On the basis of the above analysis, I find that there is partial merit in the second ground and full merit in last ground on which this appeal is premised.

**21.** The appellant's appeal therefore succeeds. In the final analysis I issue the following orders:

**(a) The appellant's appeal is hereby allowed;**

**(b) The ruling and order dated 2/3/2016 issued by the Magistrate's court in NKUBU PMCC 32 OF 2014 is hereby set aside and is substituted with an order of temporary injunction restraining the 2<sup>nd</sup> respondent from selling the suit land, that is LR Nkuene/Ngonyi/748, pending the hearing and determination of NKUBU PMCC 32 OF 2014;**

**(c) The 2<sup>nd</sup> respondent alone will bear the costs of this appeal and the costs of the application dated 24/11/2014 in the court below.**

It is so ordered.

**Dated, signed and delivered at Meru this 1<sup>st</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**